82-1260

No.

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In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

APPENDIX

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Dated: January 28, 1983

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APPENDIX A

APPENDIX A

IN THE

United States Court of Appeals

For the Seventh Circuit

Nos. 81-2009 and 81-2148

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,

vs.

COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,

vs.

DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4201—**Hubert L. Will**, *Judge.*

Argued March 31, 1982—Decided October 1, 1982

Before CUMMINGS, *Chief Judge,* NICHOLS, *Circuit Judge,** and CUDAHY, Circuit Judge.

CUMMINGS, *Chief Judge.* In appeal No. 81-2009 Copperweld Corporation (Copperweld) and Regal Tube Company (Regal)

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* Judge Nichols was an Associate Judge of the United States Court of Claims when this case was argued. He was sitting by designation. On October 1, 1982, he became a member of the newly created United States Court of Appeals for the Federal Circuit, with the title of Circuit Judge, by various provisions of Pub. L. No. 97-164.

challenge a jury verdict that they conspired against Independence Tube Company (Independence) in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and that Copperweld induced the Yoder Company (Yoder) to breach a contract with Independence. The jury also found that Regal (but not Copperweld) slandered Independence and wrongfully interfered with the business relationships of Independence and one of its customers. The jury assessed damages of $2,499,009 against Copperweld and Regal jointly and severally for the antitrust and inducement violation (trebled to $7,497,027) and $15,000 against Regal alone for the pendent tortious interference and slander claims. It also awarded Independence attorney's fees and costs in amounts determined later.[1]

Appeal No. 81-2148 addresses the propriety of the district judge's decision to direct a verdict against Regal and Copperweld on their counterclaims against Independence and its President, David F. Grohne. Regal and Copperweld had argued that Independence competed unfairly with them and that Grohne had breached his fiduciary obligations to Regal, his former employer, by luring away key Regal employees and by wrongfully using Regal know-how and technical information.

We affirm the judgment below in all respects.

I. EVENTS LEADING TO THIS LITIGATION

Regal began its existence in 1955 as a Chicago firm that manufactured steel tubing for use in heavy equipment, cargo

[1] After the oral argument in this case, Judge Will entered judgment on plaintiffs attorney fee and cost claims under 15 U.S.C. § 15. An appeal from that decision has now been docketed in this Court (No. 82-2183). Although it is our general practice to consolidate merits and fee appeals, we see no purpose in delaying the resolution of the merits case here. The fee appeal will be assigned to a randomly selected panel of this Court according to our usual procedures.

vehicles, and construction. From 1955 to 1968 Regal was a wholly-owned subsidiary of C.E. Robinson Company headed by a gentleman bearing that name; in 1968 Regal was sold to and became an unincorporated division of Lear Siegler, Inc., a California-based manufacturing concern. David Grohne came to Regal in 1959, rose to become its Vice President and General Manager by 1968, and stayed on as President of the division after Regal was sold to Lear Siegler.

In 1972 Copperweld purchased the Regal division from Lear Siegler for Regal's book value plus $3 million. The sale agreement bound Lear Siegler not to compete with Regal, or to allow any subsidiary it controlled to do so, anywhere in the United States for five years. After the sale Copperweld transferred all Regal's assets to a newly formed Pennsylvania corporation again named Regal Tube Company. Thus Regal was once again a corporation, rather than a division, but it was wholly owned by Copperweld. It continued to conduct all its manufacturing operations in Chicago, although it shared corporate headquarters in Pittsburgh with Copperweld.

As the sale of Regal to Copperweld was being negotiated, David Grohne was considering his options. By the time the sale was consummated, Grohne had accepted a job as Lear Siegler's Corporate Secretary, a position he held from February to July 1972. From July to September he continued to work for Lear Siegler, finishing various projects. Throughout this period, Grohne was also actively pursuing the possibility of establishing his own steel tubing business. In the spring of 1972 he presented a financing proposal to the Continental Illinois National Bank in Chicago and lined up several dozen investors. In May 1972 Independence was incorporated and sought bids on tubing mills from manufacturers. By late October Independence had a firm offer from Yoder of Cleveland, Ohio, and in December 1972 it gave Yoder a purchase order which called for the delivery of the mill by the end of December 1973.

Bedford Foster, Regal's General Manager, and Phillip Smith, Copperweld's Chairman and Chief Executive Officer, learned of Grohne's plans in the winter of 1972-1973. Their first thought was that the non-competition agreement Lear Siegler had signed when it sold Regal ought to prevent Grohne's entrepreneurial efforts. Defendants' lawyer, however, advised them that it did not, though he thought it might be possible to obtain an injunction against Grohne's activities if and when he made use of any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," all of which Copperweld had purchased from Lear Siegler. In February 1973 the lawyer furnished Smith and Foster with a letter to be sent to anybody with whom Grohne tried to deal. The letter warned that Copperweld was "greatly concerned if [Grohne] contemplates entering the structural tube market • • • in competition with Regal Tube" and vowed to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler."

Copperweld's stated rationale for this letter was to prevent third parties from developing reliance interests in dealings with Grohne that might later make a court reluctant to enjoin Grohne's activities at Copperweld's behest. Its actual effect was much simpler: it made Yoder, which had accepted Grohne's purchase order for the tube mill on February 19, 1973, void the acceptance two days later, when it received Copperweld's February 19th missive. Despite Independence's efforts to piece the Yoder deal back together again, Yoder made a final decision to cancel in March 1973. Thereafter Independence opened negotiations with Abbey Etna Machine Company, which finally agreed to ship Independence the necessary tube mill between April and September 1974. Although Abbey also received one of Copperweld's warning letters, it performed its agreement with Grohne. Independence Tube Corporation commenced operations on September 13, 1974—nine months later than it could

have if Yoder had delivered the tube mill as originally agreed.

Among the employees of Independence were eight former employees of Regal, whom Grohne hired after he had a commitment from Abbey and before Independence actually commenced business. Zbigniew Uzarowicz, Regal's plant manager, joined Independence in October 1973. Antanas Janonis, Regal's plant engineer, also went to Independence soon thereafter. Grohne subsequently hired six additional Regal employees—a vice president, two plant foremen, the office manager, a regional sales manager, and a salesperson. Regal and Copperweld viewed Grohne's recruitment as posing two threats: luring away key Regal employees and obtaining Regal's proprietary information and know-how from them.

In 1976 Independence filed this suit in federal district court in Chicago against Copperweld, Phillip H. Smith, its Chief Executive Officer, Regal and Yoder. Its amended complaint of May 24, 1977, charged that

> (1) Copperweld, Regal, Smith, and Yoder had conspired to restrain trade in the market for steel structural tubing, in violation of Section 1 of the Sherman Act (Count I);
>
> (2) Copperweld, Regal, and Smith had attempted to monopolize the market for steel tubing, in violation of Section 2 of the Sherman Act (Count II);
>
> (3) Yoder had breached its contract to supply a tube mill to Independence (Count III);
>
> (4) Copperweld, Regal, and Smith had interfered with Independence's contractual relationship with Yoder and business relationship with Deere Plow & Planter Works (Deere) (Count IV); and
>
> (5) Copperweld, Regal, and Smith had slandered and libeled Independence with Deere (Count V).

Count VI sought compensatory and punitive damages under all the above theories and preliminary and permanent injunctive relief.

Copperweld and Regal denied all Independence's allegations, set forth various affirmative defenses, and filed discursive counterclaims against Independence and Grohne. The defendants alleged that

> (1) Independence and Grohne used Regal's protectible know-how and confidential or proprietary information in violation of the Lear Siegler ageement and in breach of Grohne's fiduciary duties to Regal;
>
> (2) Independence and Grohne competed unfairly by hiring away key Regal employees; and
>
> (3) Independence and Grohne interfered with prospective contractual and other business relationships of the defendants by filing their lawsuit on the eve of a $30 million debenture offering by Copperweld.

Like the plaintiff, the defendants sought compensatory and punitive damages and preliminary and permanent injunctive relief.

Before trial Independence dismissed its monopolization claim (Count II supra). It also dropped Smith as an individual defendant in all the counts in which he had figured.

The liability portion of the case was tried to a jury between November 14, 1980, and February 20, 1981. At the conclusion of the evidence Judge Will directed a verdict against Regal and Copperweld on the issues raised by their counterclaims. The remainder of the case went to the jury on special interrogatories. The jury found that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act, but that Yoder had not been involved in the conspiracy (Count I). It also found Yoder liable for breach of its contract to supply a mill to Independence (Count III). The jury found that Copperweld (but not Regal) had interfered with Independence's contractual relationship with Yoder (Count

IV); and that Regal (but not Copperweld) had interferred with Independence's business relationship with Deere (Count IV) and had slandered Independence to Deere (Count V).

The damages phase of the trial was concluded on March 6, 1981. Yoder was no longer a party, having settled its liability to Independence under Count III. Judge Will instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach (Counts I and IV) should be identical and therefore should not be double-counted. The jury then awarded $2,499,009 (trebled to $7,497,027) on the antitrust claim against Copperweld and Regal, and $15,000 against Regal alone on Counts IV and V. Judgment was entered on May 27, 1981. On June 22, 1981, Judge Will handed down a 65-page memorandum opinion denying the defendants' motions for judgment notwithstanding the verdict or a new trial. These appeals followed.

II. ARGUMENTS RAISED ON APPEAL

The defendants raise a host of challenges to the trial results. They fall into three general categories.

A. The Antitrust Liability

The defendants argue that they could not as a matter of law have conspired to violate Section 1 of the Sherman Act, because they are not sufficiently distinct entities under our decision in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), certiorari denied, 445 U.S. 917. They also argue that the evidence was insufficient to prove that Regal entered into a conspiracy with Copperweld as of the sending of their lawyer's February 19, 1973 warning letter to Yoder, and that evidence of Regal's and Copperweld's conduct after that date was improperly admitted. Finally, the defendants argue that the plaintiff's failure to demonstrate harm to competition vitiates the judgment either because no antitrust injury was shown (as required by *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477), or because the appropriate Rule of Reason inquiry was never undertaken.

B. The Pendent State Law Claim

Copperweld maintains that the separate tortious interference with Yoder judgment cannot stand because Copperweld was legally privileged to take the actions it did to protect its interests. Copperweld contends that its privilege argument went unrebutted by Independence, and that the district judge erred in not instructing the jury on the claimed privilege.

C. The Directed Verdict on Defendants' Counterclaims

The defendants argue that they presented enough evidence to warrant sending their counterclaims to the jury. In the alternative they argue that the district judge's exclusion of proffered evidence in support of the counterclaims was error and requires a new trial.

D. Computation of Damages

The defendants argue that Independence's damage theory was based on methodologically flawed testimony of an unqualified expert and on unsubstantiated opinions and assumptions. They also claim to have been prejudiced by the district judge's instruction on the congruence in this case between antitrust and tortious interference damages.

III. THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE

A. Background: The Emergence of the *Photovest* Test

It is elementary that a conspiracy in violation of Section 1 of the Sherman Act, like any other kind of conspiracy, requires an agreement by two or more parties. When this case went to the jury, it could have been a garden-variety antitrust conspiracy case—Copperweld and Regal on the one hand agreeing with Yoder on the other to keep Independence out of the steel tube business. But the jury exonerated Yoder (except on the breach of contract Count III against Yoder) and instead found a conspiracy between Copperweld and its wholly-owned subsidiary Regal. As a result, it set the stage for appellants' broadly based attack on the intra-enterprise

conspiracy doctrine in the abstract and as applied to these facts.

We may begin with antithetical truisms. Two independent corporations can engage in concerted activity that violates Section 1 of the Sherman Act. A corporation and its officers, or a corporation and one of its fully integrated divisions cannot, because the requisite plurality of actors is missing. The hard case lies between these opposites: can a corporation conspire with its wholly-owned subsidiary? In a purely formal sense, the answer should be yes: there are two corporations and hence two actors. But as a practical matter there may be little difference between a wholly-owned subsidiary and a fully integrated division, and where the differences are trivial Section 1 liability should not turn on them.

Academic discussion of the intra-enterprise conspiracy[2] doctrine is almost uniformly critical.[3] The commentators generally note at the outset that the Supreme Court has never actually relied on the doctrine without qualification to decide a Sherman Act case, and therefore the broad language of some Supreme Court opinions must be taken at less than face value.[4] They also point out that government enforcement agencies do not use the doctrine.[5] Rather it surfaces in

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[2] Although the terminology is used variously, we adopt "intra-enterprise conspiracy" for the parent-subsidiary model and reserve "intracorporate conspiracy" for the situation where a division is alleged to have conspired with its own corporation.

[3] See, *e.g.*, Handler and Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981), especially the bibliography at 23, n. 3; and Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982). Handler and Smart remark that "[i]t is a doctrine with numerous critics and few friends," *op. cit.* at 23.

[4] See *e.g.*, Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717, 718-727 (1977).

[5] *Id.* at 729. Note, however, that the Report of the Attorney General's National Committee to Study the Antitrust Laws 34-35

(footnote continued on next page)

private suits—where plaintiffs rely on it to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards. So used, the intra-enterprise conspiracy doctrine fills a gap between Section 1 and Section 2—a gap that should either remain entirely unfilled or be left to state-law remedies.[6] Otherwise, the commentators argue, the real efficiencies achievable by separately incorporated but closely related corporations will be sacrificed,[7] and the antitrust laws will be used perversely to achieve either more independence or more integration than is optimal.

Judicial attitudes toward the intra-enterprise conspiracy doctrine are more constrained. For a federal judge at the trial or appellate level, the salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored.[8] It is no ac-

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(1955) would differentiate between parent-subsidiary pricing or distribution decisions (no liability) and agreements that have a "coercive [effect on] the trade of strangers to the corporate family" (liability). This case falls in the latter category. See also Section of Antitrust Law of the American Bar Ass'n, Antitrust Developments 1955-1968, at 19-22 (1968).

[6] Handler and Smart, *op. cit.* (note 3 *supra*) at 25.

[7] Economies of scale are the main reason for integration, whether it is full or partial. The choice between partial integration (the parent and its wholly-owned subsidiary) and full integration (the corporation and its divisions) may be dictated by a desire to (1) save taxes (not a "real" efficiency), (2) maintain the good will associated with the subsidiary, (3) have some decentralization of production, distribution or management, (4) enhance a particular part of the enterprise in capital markets, or (5) minimize the effect of protective legislation against foreign corporations. See 75 Mich. L. Rev. at 728 & n. 71.

[8] *E.g.*, *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227: "[T]he common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy

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cident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the capacity to conspire, whether or not they can be found to have done so in a particular case.[9] Among the circuits there have been various limiting approaches—but no move to abolish the doctrine root and branch.

This Circuit's position has recently been articulated in *Photovest Corp., supra*, 606 F.2d 704, 725-727. Like the Eighth and the Ninth Circuits,[10] we focus on the practical relationship between the parent and the subsidiary, using a variety of factors to decide when there is enough separation between the two entities to make treating them as two independent actors sensible. The test is admittedly in an early and unsettled stage of development, as is inevitable with: (a) any

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from the impact of the [Sherman] Act." *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215: "[The] suggestion [that their status as a single business unit makes them incapable of conspiring] runs counter to our past decisions that common control and ownership does not liberate corporations from the impact of the antitrust laws." *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598: "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142: "[S]ince respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."

[9] See the survey in Handler and Smart, *op. cit.* (note 3 *supra*) at 40-61. The author of 95 Harv. L. Rev. 661 (note 3 *supra*) concedes (at 676) that "Supreme Court precedent precludes the lower courts from considering * * * if concerted action by related corporations should *ever* be considered a conspiracy under section 1" (emphasis added).

[10] See, *e.g.*, *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), certiorari denied, 433 U.S. 910.

test that involves the presence or absence of various unranked factors, (b) the possibility that the list will expand or contract, and (c) as yet limited application. Nonetheless, we think it focuses on the proper question—namely, when the distinction between affiliation and integration is trivial and when it is significant. And it seeks the answer to the question in terms of evidence that is empirical, readily furnished, and amenable to development at trial—as more arcane economic calculations are not. Its flexibility means that it can mediate between the corner positions of academic critics on the one hand and sweeping Supreme Court dicta on the other. And the uncertainties that necessarily exist now will be obviated as the test is applied and refined.

In short, *Photovest* represents a reasonable and pragmatic approach to the intra-enterprise conspiracy problem, and we intend in what follows to adhere to it.

B. *Photovest* Applied

Copperweld and Regal have two quarrels with the application of the *Photovest* criteria to this case. One centers on the instructions which the trial judge gave, and their failure to correspond exactly to the *Photovest* language. The second involves the sufficiency of the evidence, assuming that the instructions were substantially correct.

There is some dispute about whether the instruction issue has been preserved on appeal,[11] but we conclude that it is properly before us.[12] The defendants first criticize the in-

[11] Independence contends that Copperweld's and Regal's trial attorneys (who are not representing them in the appeal) acquiesced in all the instructions to which objection is now made (Br. 33-37). The effect of such acquiescence under Rule 51 of the Federal Rules of Civil Procedure would be to remove from our consideration any error in the jury charge that was not "plain error [resulting] in a miscarriage of justice." 5A *Moore's Federal Practice* ¶ 51.04, esp. 51-15 (1982).

[12] Judge Will's post-trial order (App. 228-293, esp. 240-243) dealt extensively with the claimed instructional defects—an indication

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structions for failing to duplicate the *Photovest* factors verbatim (Br. 32-33). Yet *Photovest* itself, as Judge Will noted (App. 242), does not make its factors canonical.

> [W]e must decide each case on its particular facts. Some relevant factors to consider include "the extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.

606 F.2d at 726, quoting L. Sullivan, *Handbook of the Law of Antitrust* 328 (1977). There can be no claim, based on the language of *Photovest,* that this Court's *ipsissima verba* are necessary.

The more substantial issue is whether the instructions Judge Will did give [set out at App. 240-241] are consistent with the analysis undertaken in *Photovest.* That they are is convincingly shown in the Appendix to this opinion, where the instructions and the critical paragraphs of the *Photovest* opinion are juxtaposed. Moreover the judge's charge emphasized to the jury that they were looking for real, rather than merely formal, distinctness:

> The rule is that a parent like Copperweld and a subsidiary like Regal are capable of combining or conspiring together unless they are operated in such a way as to, in effect, constitute just one company.
>
> • • • •

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that the defendants' objections were sufficient. This same issue recurs elsewhere in this appeal, and we have generally resolved ambiguities in defendants' favor. See *Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247, 255-256.

> If you find from the evidence that Regal Tube Company is not sufficiently distinct from Copperweld as an economic entity, then you must consider them as a single person • • •.
>
> [App. 156, 158; these statements immediately precede and follow the 9 specific capacity instructions.]

Despite this congruence with *Photovest's* approach, the defendants claim to have been prejudiced by particular instructions or phrases within instructions.[13] In view of the overall emphasis, there is no realistic possibility that the jury could have singled out any one factor—or part of a factor—to the exclusion of all the others. Furthermore, the defendants exhibit some confusion about how a balancing test works. *Photovest* took a variety of considerations and weighed them, and the balance in *Photovest* tipped in one direction. That does not mean that in all future cases the factors on the lighter side of the scale must be excluded. They may again turn out not to be probative, but it is not legal error to consider them. Of course, once a body of law accumulates, a court may redefine its balancing test or substitute a bright-line rule, based on its experience. We are not yet in a position to do that.

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[13] For example, the reference to "separate bank accounts" and "separate records" (#7) though "[o]stensibly neutral, • • • is actually heavily weighted against defendants" (Br. 34). "Item 8 [whether both companies were separate participants in the alleged unlawful activity] • • • invited the jury to find capacity on the ground that employees of both Copperweld and Regal were allegedly active" (*id.*). The reference to "day-to-day operations" (actually the instruction mentioned both day-to-day and policy decisions) is "rightly disregarded [in *Photovest*] as an irrelevant factor (*id.*). Finally, the invitation to consider "any other facts" relevant to capacity is considered authorization for "the jury to substitute its own notions about capacity for the standards set by this Court." (*Id.* at 35).

Our holdings so far—that *Photovest* governs this Circuit's treatment of intra-enterprise conspiracy and that Judge Will's instructions comport with *Photovest*—are virtually dispositive of the defendants' challenge to the jury's finding of capacity to conspire. Jury factfinding, unlike judicial factfinding, is not subject to direct attack as "clearly erroneous." In view of the Seventh Amendment's prohibition ("no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law"), a jury verdict can only be set aside if the "evidence [viewed] in the light most favorable to the plaintiff and • • • [the] facts and inferences reasonably drawn from the facts • • • lead to but one conclusion—that there is a total failure of evidence to prove the plaintiff's case." *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1064 (1st Cir. 1980), vacated on other grounds, 453 U.S. 247.[14] It is particularly appropriate to

> "give [the plaintiff] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn," *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 • • •, in complex antitrust cases • • • "where motive and

[14] This is the standard for directing a verdict [i.e., removing a case from the jury] and for entering judgment notwithstanding the verdict [i.e., overriding the jury's decision], *Fact Concerts, supra*, 626 F.2d at 1064, vacated *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247; 5A *Moore's Federal Practice* ¶ 50.07[2] at 50-76 to 50-83 (1982). It is also the standard for appellate review, 5A *Moore's Federal Practice* ¶ 50.07[2] at 50-83; cf. *Gray* v. *General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970).

The standard for granting a new trial is broader (a partial catalog of permissible reasons appears in 6A *Moore's Federal Practice* ¶ 59.08[1] (1982)) because any retrial is also to a jury and because such judicial control over jury verdict had existed at common law, *id.*, ¶ 59.04[2]. But appellate review is limited to abuse of discretion. Here the district court's denial of the new trial motion is before us because it is merged with the final judgment, but we find no abuse of discretion.

> intent play leading roles," *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 • • •, because "[f]indings as to the design, motive and intent with which men act depend peculiarily upon the credit given to witnesses" by the trier of fact. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 • • •.
>
> *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978).

The issue here–how much separation Regal and Copperweld in fact maintained in the conduct of their business—is similarly fact-bound and inferential.

The plaintiffs presented evidence from which the jury could have found that

> (1) Regal had existed as a division of C.E. Robinson Company and of Lear Siegler before its acquisition by Copperweld, and that Copperweld intended Regal to "keep its ongoing business and keep serving the market and customers it was already serving" (testimony of Smith, T. 3031).
>
> (2) The acquisition of Regal did not have the practical effect of enabling Copperweld to handle additional steps in its own manufacturing process (comparable to the forward integration found in *Photovest*), but established Copperweld in an entirely new line (testimony of Smith, Tr. 3029).
>
> (3) Regal management had real autonomy in both day-to-day and policy decisions (Smith testimony, App. 708-710; Foster affidavit, App. 647).
>
> (4) Not only were Regal's expenses and revenues segregated (Smith testimony, App. 708-710) but Regal's operating manager's compensation was based primarily on Regal profitability (Breedlove, Tr. 4934-35, 4937, 4958).

(5) Regal had a separate sales force and clientele (until the 1979 reorganization of Copperweld's subsidiaries) and made its own arrangements with suppliers of equipment and raw materials (App. 361-376 (sales); App. 305-308, 1054-1056 (suppliers))—a fact relevant to the ability of the defendants to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division (Indep. Br. 31-32).

Taken together this information creates a much fuller and more consistent picture than did the two "isolated [distinct entity] statement[s]" in *Photovest*, 606 F.2d at 727, the same record on which a jury verdict of conspiracy was overturned in *Ogilvie* v. *Fotomat*, 641 F.2d 581, 589-590 and n. 27 (8th Cir. 1981). The jury here was entitled to conclude that Regal was not "merely a service arm of [its parent], more like a corporate division than a separate corporate entity," *Photovest*, 606 F.2d at 727.

C. Defendants' Other Claims of Error under the Sherman Act Count

1. *The existence of a conspiracy.*

The defendants argue that even if the capacity hurdle was overcome, no conspiracy was proven. Their initial objection, that the proof was circumstantial rather than direct (Br. 36), is meritless: conspiracies are by their nature not subject to direct proof. Furthermore, *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), certiorari denied, 102 S. Ct. 1610, does not state a proof requirement for all conspiracies, but a method of dealing with those in which an agreement is inferred on the basis of "conscious parallelism" among the co-conspirators. This is not a "conscious parallelism" case.

The defendants also argue that the evidence of Foster's and Smith's conduct up until February 19, 1973 (the date on which the letter to Yoder was mailed) was insufficient, and that evidence of their later activities—which tended to cast a

more sinister light on their doings—was improperly admitted. This argument rests on a fundamental misunderstanding about the conspiracy alleged: Independence's contention was that Copperweld Chairman Smith and Regal General Manager Foster had engaged in a continuing course of anticompetitive conduct, but the only actual harm they had been able to cause was Yoder's cancellation of the tubing mill contract.[15] The other recipients of the warning letters—including Abbey-Etna, Continental Illinois National Bank, First National Bank of Chicago, C.E. Robinson, various real estate firms, and major steel suppliers (App. 84, 239)—did nothing that was productive from Copperweld's and Regal's perspective, or detrimental from Independence's. The only other instance of tangible harm to Independence—the defamatory remarks to Deere—was unrelated to the letter-writing campaign. We find that the evidence of a conspiracy (pre- and post-February 1973) was properly admitted and the jury's inferences from it are unassailable.

The defendants finally argue that Judge Will made inconsistent legal rulings when he found that Regal could not be held liable as a joint-tortfeasor with Copperweld for inducing Yoder's breach of contract, but did not also rule that Regal

[15] The situation is thus not similar to, and there was no error in Judge Will's different treatment of, Yoder's breach of the tubing mill contract (Def. Br. 43, n. 15). Judge Will refused to admit defendants' evidence about Yoder's state of mind in May 1973 on the issue of what Yoder did, or why, in February of that year. The only questions relevant to Yoder's breach of contract (a more discrete event than a conspiracy) were those contemplated in the Uniform Commercial Code: (1) whether a contract had been formed, an issue Judge Will resolved as a matter of law; (2) whether Yoder became insecure after receiving the Copperweld letter, sought assurances from Independence, and did not receive them (UCC 2-609); and (3) whether Grohne failed in his duty to disclose to Yoder the existence of basic facts (UCC 1-203, 2-302). The defendants' proffered evidence was not relevant to any of the dispositive questions.

could not be Copperweld's co-conspirator. (Br. 40-42). This argument overlooks important substantive differences between tort and conspiracy liability, as Judge Will pointed out (App. 234-235). To be liable for tortious interference with contract, Regal would have had to know that the Independence-Yoder contract existed, and would have had to do a specific act to cause the breach of contract. *Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 291 (7th Cir. 1969), certiorari denied, 396 U.S. 902. In other words, to be a joint tortfeasor, Regal had to have causal responsibility for the breach. To be liable for damages caused by the breach under the antitrust conspiracy theory, Regal had only to have entered into an agreement to hamper Independence's entry into the market and have taken some step toward that end. Once that showing was made, Regal could be liable for any actions of Copperweld in furtherance of the conspiracy, on the theory that for the duration of the conspiracy conspirators are accountable for each other's actions. *T.V. Signal Co. of Aberdeen* v. *American Telephone & Telegraph*, 462 F.2d 1256 (8th Cir. 1972). Section 1 of the Sherman Act casts a wider net than do principles of common-law tort liability.

2. *The failure to demonstrate anticompetitive effect.*

Defendants argue that Independence has failed to make out "antitrust injury," as that term is used in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (Br. 44).[16] *Brunswick* defines antitrust injury as

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of an-

[16] Independence's suit is a far cry from the curious allegations in *Brunswick*. There the antitrust plaintiffs argued that Brunswick, by taking over the operation of financially shaky bowling alleys rather than allowing them to fold, had deprived plaintiffs of the profits they could have earned if the bowling-alley market had been less competitive.

> ticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. at 125.

If "antitrust injury" inquires into causation, the injury Independence claimed flowed directly from the defendants' conspiracy to keep it from going into business as their competitor, a clear violation of Section 1 of the Sherman Act. If "antitrust injury" also states a limitation on damages, as is argued in Page, *Antitrust Injury and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980), it equally supports Independence's recovery here:

> The traditional measures of damages for the total exclusion[17] of a competitor from the market accurately reflect antitrust injury. [If] a potential competitor is denied entry to a market because of the existing competitors' control of a necessary facility or resource[18] • • • damages [should reflect] returns on the output that the market would have supported but for the collective impediment to new entry.
>
> Page, *op. cit., supra*, 485-486.

Defendants also argue that the district court should have required Independence to show anticompetitive harm by demonstrating that Regal's market share increased after the allegedly anticompetitive conduct. This showing, they argue, is mandated by our decision in *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980) (Br. 45-50).

Defendants misread *Havoco*. Its main message is that outside the limited category of *per se* violations of the anti-

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[17] Here the exclusion was total, but for a limited time.

[18] Here the necessary facility or resource was the steel tubing mill, which the defendants persuaded Yoder not to supply. See the discussion of damages, Part V *infra*.

trust laws[19] actual harm to competition must be demonstrated under the Rule of Reason analysis before an offense against the antitrust laws will be made out. That proposition was recognized by the district judge here, and he so instructed the jury (App. 162-164):[20]

> Independence must establish by a preponderance of the evidence that the delay in its entering into business resulted in a decreased supply or higher prevailing prices in the market or otherwise adversely affected competition in the relevant market (App. 164).

Havoco does not say that harm in the relevant market is demonstrable only by market share evidence, but rather that the relevant market must be defined with enough generality to ensure that harm to competition is not assumed where no more than harm to a person engaged in interstate commerce is shown. 626 F.2d at 558. Here the jury was instructed that

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[19] There is some sentiment in the scholarly commentary that all antitrust violations involving a parent and a subsidiary as conspirators should be subject to Rule of Reason analysis, even where the conduct at issue (*e.g.*, price-fixing, certain boycotts, certain tying arrangements) would otherwise be classified *per se* violation. See, *e.g.*, Comment, *Corporate Liability for Intra-Corporate Conspiracy in Restraint of Trade*, 1968 U. Ill. L. F. 248, 253. That approach is certainly salutary where the capacity to conspire is presumed on the strength of formally separate corporate identities. We have not yet had sufficient experience with *Photovest's* more pragmatic approach to the capacity problem to know whether the Rule of Reason is also needed here as a prophylactic against unduly expansive antitrust liability. This case was not decided on a *per se* basis.

[20] Contrary to the impression in Defendants' Brief (46-47) Judge Will's "impatient" remarks quoted there did not "forbid" closing argument and instructions on market share. The issue was the admissibility of a summary exhibit (prepared by the defendants' trial counsel), and Judge Will was speaking out of the jury's presence (Indep. Br. 51-52). Defendants did present evidence about market share, so that the summary exhibit would have been, at best, cumulative (App. 258-259).

the relevant market was the area "in which [Independence] and the defendant Regal operate and to which purchasers can practicably turn for supplies of structural steel tubing or any substitutable products." This definition precludes any facile equation of harm to Independence and harm to competition.

Defendants also seem to cite *Havoco* for the proposition that Independence must fail under a Rule of Reason analysis unless it can demonstrate that Regal's market share increased as a result of Independence's foreclosure from the market (Br. 48-49). However true that proposition may be when an actual competitor is harmed or driven out of business,[21] it makes no sense in a foreclosure case. Here by contrast it would be an anticompetitive sign if Regal could maintain its market share so long as Independence was kept out of the steel tubing business, but lost ground to independence once the latter began production. That was, as defendants concede (Br. 49), exactly what the evidence suggested.[22]

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[21] The cases on which the defendants rely are of this type: *Havoco, supra* (actual competitor allegedly harmed); *Kaplan* v. *Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), certiorari denied, 447 U.S. 924 (actual competitor allegedly driven out of business); *Northwest Power Products, Inc.* v. *Omark Industries*, 576 F.2d 83 (5th Cir. 1978), certiorari denied, 439 U.S. 1116 (terminated distributor claiming *per se* violation of antitrust laws). In these circumstances before-and-after market share figures will give some indication whether the antitrust plaintiff is simply an inefficient firm whose place has been taken by a more efficient one or whether the relevant market is becoming less competitive.

[22] There was accordingly no error, even if defendants preserved their objections to the instructions (cf. Independence Br. 52 and App. 258-261 with notes 11 and 12 *supra*) and were deterred by Judge Will's remarks from arguing their theory in closing, since their theory was wrong in these circumstances.

IV. THE STATE LAW ISSUES

A. Plaintiff's Pendent State Claims

Having affirmed the judgment for Independence on its antitrust claim, we would ordinarily not need to discuss at length the defendants' attack on the alternative tortious inducement of a breach of the Yoder contract (Count IV).[23] But one point requires some attention. Copperweld claims a privilege to interfere with the Yoder contract to protect its own legal interests. At trial, the privilege figured in both the antitrust count (where it was alleged to come within the *Noerr-Pennington* doctrine)[24] and the tortious interference with Yoder count. On appeal, the *Noerr-Pennington* doctrine has been abandoned, but Copperweld continues to insist with reference to the tort count that the privilege is unqualified, that showing the absence of the privilege was part of plaintiff's prima facie case, and that Judge Will did not give the jury proper instructions on it (Br. 50-58). Because there is a possibility that, had there been error, it could have affected the whole judgment, we address Copperweld's interpretation.

According to Copperweld (which alone was found liable for the tortious inducement of Yoder's contract breach), a belief that one has legal rights, however mistaken, can excuse any action, however disproportionate, to protect one's

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[23] Their claim that the instruction on the identity of damages under that count and the antitrust count prejudiced them is discussed in Part V *infra*. Defendants apparently do not contest bringing together Regal's liability for statements made to Deere and improper interference with Independence's and Deere's relationship.

[24] The doctrine takes its name from two Supreme Court cases: *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657. It shields concerted efforts to influence public officials [including those in courts and administrative agencies] from antitrust liability. It does not shield all concerted activity that is allegedly taken with an eye toward litigation. See Judge Will's discussion, App. 237-240.

interests, however tenuous.[25] If this were a true statement of Illinois law, liability for tortious interference with a contract would be exceedingly rare.

Actually the Restatement (Second) of Torts, Section 733, on which Copperweld relies, states a more modest privilege:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Under this version the legally protected interest must exist at least in the abstract,[26] the assertion of it or the threat to enforce it must be made in good faith, the means chosen must be appropriate, and the claimant must believe that the

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[25] "The privilege [is] to take steps to safeguard one's own legal interests, even though they may interfere with another's contractual rights" (Def. Br. 51).

[26] Copperweld argues that *Hahn & Cady* v. *A.O. Smith Corp.*, 320 F.2d 166, 169 (5th Cir. 1963), certiorari denied, 375 U.S. 944, and *Dinkins* v. *General Aniline & Film Corp.*, 214 F. Supp. 276, 280 (S.D.N.Y. 1962) show that the claimed legal right can be nonexistent. That is an overstatement of those cases. They indicate rather that the legal claim must be colorable, even if it is ultimately unsuccessful. In *Hahn & Clay*, Smith's employees had signed covenants not to use Smith's trade secrets. At the time Smith notified various people of its rights, its employees were working for Hahn & Clay and Hahn & Clay and Smith were bidding for the same contract. In *Dinkins* the employee was a former GAF president who had signed a contract with a non-compete term, but proposed to act as a consultant for GAF and one of its main competitors simultaneously. Thus in each case the privilege claimant could point to some specific source of his legal right. Copperweld's claimed rights are much vaguer and more conclusory.

contract or transaction, if allowed to go forward, would impair or destroy that right.

As a threshold matter, there was a general misunderstanding about the legally protectible interest. Copperweld knew from its first consultation with a lawyer that neither Grohne nor Independence was bound by the non-competition agreement it had signed with Lear Siegler when it bought Regal. Copperweld may have thought that Grohne owed certain duties to Regal because of his former employment and that these duties now ran to Copperweld as Regal's parent corporation. That is the basis of the counterclaims, discussed in Part IV.B *infra*. But if that is the legal interest, there is first no basis in fact for the assertion of it (see note 26 *supra*). Furthermore there is a complete lack of connection between that right and Copperweld's approach to Yoder. Grohne could buy a tube mill from a mill manufacturer without relying on Regal trade secrets, customer lists, or other proprietary information. Recognizing the discontinuity, Copperweld claims that it was protecting its right to enjoin Grohne, should he violate his fiduciary duties at some future time, by preventing third parties from developing reliance interests in Grohne's business. That theory improves the fit between the action and the rationale. But then the difficulty is that a preference for injunctive relief rather than monetary damages—when both are remote because the harm is neither actual nor imminent—can hardly qualify as a "legally protected interest."

In fact, Judge Will was probably more generous in instructing the jury on Copperweld's theory than he needed to be. Copperweld attempts to show otherwise by focusing solely on the instructions under the tort count (App. 181-183). But the district judge had already given the jury extensive instructions under the antitrust count (App. 164-169), and these were incorporated by reference, rather than fully

reiterated, under the tort count.[27] Reading the two sets of instructions together, we can see that the jury was told that: "preparing an injunction suit" was a "legitimate objective" (App. 165); such a lawsuit need not be filed to demonstrate a good faith intent to sue (App. 167); reliance on the advice of counsel was a factor but not a complete defense (App. 169); the actual existence of a legal basis for suit was irrelevant to good faith, but some quantum of investigation was required (App. 167); and Copperweld was entitled to be concerned about the formation of Independence as a competitor but its concern had to be focused on Independence, not translated into threats against parties with whom Independence dealt (App. 166). These instructions contain all that is correct in the defendants' proposed instruction:

> Under the law, a person may properly interfere with the contractual rights or business relations of another by in good faith asserting or threatening to protect a legally protected interest which he believes may otherwise be impaired or destroyed.
>
> If you find that Copperweld's letter of February 19, 1973, was sent on the advice of counsel in a good-faith effort to protect legal rights which Copperweld believed would otherwise have been impaired or destroyed, then you must find that the defendants are not liable on the plaintiff's tortious interference claim.
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> [Defendants' Instruction 39 Revised, Def. Br.54]

Unlike the defendants' instruction, Judge Will's did not eliminate the "reasonable means" requirement nor make the

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[27] App. 165: "[This issue] about the letters is in the antitrust claim and is applicable or involved in the later alleged improper inducement by Copperweld to Yoder to breach its contract with Independence." Cf. App. 181 (instructing on the tortious interference with Yoder count): "We have been through this, but I will repeat it here because it is relevant here." The jury had the instructions during its deliberations (App. 190) and could refer to both passages.

advice of counsel so prominent that the jury could be misled into according it conclusive importance.

Here as elsewhere in this appeal Copperweld's real complaint is that the jury disbelieved its version of events. As we have already indicated (pp. 14-16 *supra*), we do not substitute our judgment for the jury's. There was ample reason for its decision. For example, if notice rather than intimidation had been the purpose of Copperweld's campaign, one letter to Yoder would have served. A second and third were in fact sent (App. 593-594). If protection of Regal's proprietary interests had been the rationale, then Copperweld's actions were premature (App. 636, 638)[28] and probably specious (App. 760-777, 677).[29] We would therefore have affirmed the jury's findings if we had had to reach them on the antitrust appeal and we do affirm them on the tortious inducement of Yoder count.

B. Defendant's State-Law Counterclaims

Judge Will did not allow the issues raised in the defendants' counterclaims to go to the jury. Defendants argue that they presented enough evidence to avoid a directed verdict on several of the counterclaim issues and that a new trial is required. They apparently do not still main-

[28] See *e.g.* the advice from Copperweld's counsel (June 7, 1973) (App. 636): "[T]here is not much we can do until [Grohne] starts to operate or solicit customers, other than make known our intentions which has already been done. He should therefore be kept under continued surveillance and once he starts to operate or solicit customers we should pounce on him."

[29] App 760-777: May 5, 1974 letter to Copperweld from lawyer retained as expert in trade secret law, indicating that Regal had taken no steps whatsoever until then to give itself any protectible interest in its employees, its customer lists, or any other information. Cf. App. 677: General understanding in industry that manufacture of steel tubing involves no trade secrets, employees frequently change jobs among competing firms, and everybody knows who the buyers of steel tubing are.

tain that Independence hurt Copperweld's debenture offering.

It is by no means clear exactly what issues defendants' appealed counterclaims included. The defendants say that the counterclaims rested on "two theories: unfair competition and tortious inducement of employee" (Br. 60). They disclaim any reliance on trade secrets (Br. 61), but argue that "improper means used to gain information is a separate basis of liability, regardless of whether the information constitutes a technical trade secret in the narrow sense of the word," *Crocan Corp.* v. *Sheller-Globe Corp.*, 385 F. Supp. 251, 254-255 (N.D. Ill. 1974). The information must, they admit, be more than "purely public information" (Br. 62), but "internal business information, such as the financial, planning, design, and technical data involved here, cannot be taken by an employee without his [employer's] knowledge or consent and used in a competitive venture" (*id.*).

The thrust of defendants' claims seems to be that Grohne competed unfairly with Lear Siegler and (after the sale of Regal) with Copperweld by not telling them of his plans to form Independence (Br. 62-63) and that his hiring of "key" Regal employees was tortious either because it hurt Regal to lose them or because through them Grohne gained access to "internal business information" (Br. 63-64).

The first obstacle to defendants' theory is that it was established, and the defendants do not contest, that Grohne was not bound by the terms of the Lear Siegler-Copperweld contract not to form his own business. There is nothing sinister in his decision to do so, or in his not telling them of his plans at an early stage. The district court's exclusion of the testimony of Robert Campion, Lear Siegler's president, was obviously proper insofar as that testimony related to Grohne's "surreptitious conduct [and] his deception" or to Campion's conclusion that Grohne's activity demonstrated "a conflict of interest" (Def. Br. 64-65).

But the defendants also argue that Campion would have testified, if permitted, that Grohne took documents Campion considered confidential before he left Regal. Here it is hard to see that Mr. Campion's opinion had any relevance; one would expect Copperweld or Regal as counterplaintiffs to have to demonstrate continued confidentiality and harm to themselves, rather than rely on the statements of Regal's former owner's president. More important, there is no hint of the "improper means" that would extend trade secret protection to this category of information under *Crocan Corp., supra*,—unless it is Grohne's secrecy, in which case the agreement achieves perfect circularity.[30]

Under the tortious inducement or "employee piracy" (Reply Br. 24) theory, the focus wavers: sometimes defendants seem to be complaining about confidential information the employees brought with them to Independence (*e.g.*, Br. 63) and sometimes they concentrate on the value the employees had to Regal (*e.g.*, Br. 63, 67). Under its first aspect, the theory suffers from all the defects of the similar argument about Grohne and the Regal Division of Lear Siegler—only more so. For here it is uncontroverted that Regal as Copperweld's subsidiary made no effort to restrict access to the sort of information allegedly taken—*i.e.*, shop drawings and blueprints of machinery. (Reply Br. 23; DX 300 et seq.).[31]

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[30] Contrary to defendants' argument (Reply Br. 21-23 + n.18) the presence of "confidential stamps" on Regal documents does not establish confidentiality. *United States Trotting Ass'n* v. *Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (*en banc*), on which defendants rely, only says that a proprietary legend, supported by other facts indicative of ownership, can, if unrebutted, lead to summary judgment on a misappropriation claim. This is not a misappropriation case, and ownership and confidentiality are not identical concepts.

[31] Well after the hirings, Copperweld's legal expert wrote:

> [L]ittle or no security has been maintained even with regard to those specific matters that could legitimately be considered as confidential to the company. Thus, there is relatively open

(footnote continued on next page)

Under its second aspect, the theory does not state a claim unless the following elements are made out:

> (1) existence of a valid business relationship or expectancy;
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> (2) knowledge of the relationship or expectancy on part of the interferer;
>
> (3) an intentional and malicious interference inducing or causing a breach or termination of the relationship or expectancy;
>
> (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Ancraft Products Co. v. *Universal Oil Products Co.*, 84 Ill. App. 3d 836, 844, 405 N.E.2d 1162, 1168 (1st Dist. 1980). In the absence of an employment contract (as here) malice becomes a key element. Without malice, "principles of free competition prevent liability to a subsequent employer." *Id.* at 844. Yet malice is exactly what defendants here could not show, except by asserting that it was inferrable from the acquisition of Regal's technical drawings. As was the case with the unfair competition claim, defendants' arguments on this point are circular. They would not have been rendered more convincing if Judge Will had admitted the proffered testimony of two additional witnesses—one an employee who assumed she was being solicited but could not point to any-

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(footnote continued from preceding page)

> access to the plant and to files; there are no sign-in or sign-out procedures; none of the plant areas are marked as "restricted" and few documents are marked as "confidential," there are no inhibitions on copying or removing documents, etc. Moreover, the company has issued no instructions to nor obtained any agreements from its employees that they will not disclose information when their employment terminates, nor does it have any agreements with key employees restricting their future competition.
>
> App. 768.

thing specific in her conversation with Grohne, the other a man who worked for Regal as an independent sales agent. Copperweld and Regal are basically arguing "[t]hat nobody in his business may offer better terms to an employe, himself free to leave." That, in the words of Learned Hand, "is so extraordinary a doctrine that we do not feel called upon to consider it at large." *Triangle Film Corp.* v. *Artcraft Pictures Corp.*, 250 F. 981, 983 (2d Cir. 1918), quoted in *TAD, Inc.* v. *Siebert*, 63 Ill. App. 3d 1001, 1007, 380 N.E.2d 963, 967 (1st Dist. 1978). See also Perlman, *Interference with Contract and Other Economic Expectancies*, 49 U. Chi. L. Rev. 61, 111-115 (1982). Judge Will did not err in taking defendants' counterclaim issues away from the jury.

V. THE DAMAGE AWARDS

In the damages phase of this bifurcated proceeding, the jury returned the following damage verdicts:

> [T]he damages sustained by Independence as a result of the conspiracy between Copperweld and Regal against Independence in violation of the antitrust laws and for inducement of the breach by Yoder of its contract with Independence, but exclusive of any damages relating to the activities in 1975 of Regal with respect to Deere Plow and Planter Works, were $2,499,009.
>
> [The damages for the antitrust violation and the inducement of the breach of the Yoder-Independence contract are the same and should not be added together.][32]
>
> [T]he damages sustained by Independence as a result of the improper interference in 1975 by Regal with Independence's business relationship with Deere Plow and Planter Works and the commercial defamation of Independence by Regal to Deere were $15,000.

[32] The bracketed language in this verdict form and the one that follows went to the jury.

> [The damages for the improper interference and the commercial defamation are the same and should not be added together.]

App. 223. The defendants challenge both the amount of the damages and the propriety of the instruction that equated tortious inducement and antitrust damages.

A. The Instruction

In the damages part of this litigation, state law and federal antitrust law again converged (cf. Part IV.A *supra*). As was the case with the two theories of liability, so here with the two types of damages the jury was instructed in a way that, had there been error, might have affected the whole verdict.[33] Accordingly, although we have affirmed the antitrust liability and will (in Part V.B *infra*) affirm the antitrust damages, we must first address defendants' state-law arguments.

The defendants' theory is that when Judge Will told the jurors that damages on Count I (the antitrust claim) and Count IV (the tortious inducement of breach of contract claim) were "the same and should not be added together," and then told them that they could "consider estimates and reasonable approximations to the extent necessary to determine Independence's damages," he effectively obscured the differences between federal antitrust damages and Illinois' more rigorous proof requirements. The defendants represent that Illinois requires tortious inducement damages to be shown "with a reasonable degree of certainty." *William Zeigler & Son* v. *Chicago Northwestern Development Co.*, 71 Ill. App. 3d 276, 288, 389 N.E.2d 195, 203 (2d Dist. 1979) (quoting *Rivenbark* v. *Finis P. Ernest, Inc.*, 37 Ill. App. 3d 536, 538-539,

[33] Defendants have preserved the issue by appealing both the instruction and the amount of antitrust damages. On the liability point, they could have been treated as having waived it by failing to raise the same arguments in the antitrust context as they did in their appeal of liability for tortious interference with the Yoder contract. We have not held them to a waiver.

346 N.E.2d 494, 496 (5th Dist. 1976)). Then they suggest that Illinois courts will not entertain claims for lost business profits unless the business has a record of performance established before, rather than after, the tortious interuption. Taken to its logical (but absurd) conclusion, this argument suggests that whenever tortious interference keeps a business from getting started, even if the business subsequently prospers the harm is uncompensable. If that were an accurate statement of Illinois law, it would indeed make antitrust and tort damages subject to different standards. A business excluded from the market by other businesses' antitrust violations can ordinarily recover lost profits for the period of exclusion. *Midland Telecasting Co.* v. *Midessa Television Co.*, 617 F.2d 1141, 1144 n.6 (5th Cir. 1980), certiorari denied, 449 U.S. 954; *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97, 106 (5th Cir. 1967), certiorari denied, 390 U.S. 904.

The truth of the matter is that defendants' statement of Illinois law is in error. Illinois courts do not require the impossible in a case where damages are sought for lost profits. See, *e.g.*, *Hemken* v. *First National Bank of Litchfield*, 76 Ill. App. 3d 23, 27, 394 N.E.2d 868, 872 (4th Dist. 1979) (emphasis added):

> Where lost profits are sought to be recovered as damages, the recovery is to be based upon the net profit. Net profits are determined by computing the difference between the gross profits and the expenses that would be incurred in acquiring such profits. While these damages may not be speculative, *they need not be proved to a mathematical certainty. The plaintiff is only required to show a reasonable basis for their computation.*

The case the *Hemken* court cited as authority was *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, a federal antitrust case which allowed great latitude to the plaintiff in proving the amount of damages.

Defendants' theory that a prior profit history is essential has also been rejected by the Illinois Supreme Court in *Schatz* v. *Abbott Laboratories, Inc.*, 51 Ill.2d 143, 147-148, 281 N.E.2d 323, 325-326 (1972):

> We do not interpret [a 1917 Illinois Supreme Court case] to hold that evidence of prior profits is the *sine qua non* of proof of damages suffered by a business enterprise. The significant holding found in the opinion is stated at [277 Ill. 286, 289], as follows: "It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. * * * All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

The Illinois cases on which defendants rely are either distinguishable from or earlier than Schatz.[34] There are also cases later than the Maryland and New York ones defendants cite, in which their purported rule has been rejected.[35]

Likewise, in applying Illinois tort law in federal cases, our own Court has stated that "only a reasonable basis of computation is required for the submission of the question of

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[34] As Judge Will noted, *Rhodes* v. *Sigler*, 44 Ill.App. 3d 375, 357 N.E.2d 846 (3d Dist. 1976), contains only weak dictum; and *Tonchen* v. *All-Steel Equipment, Inc.*, 13 Ill. App. 3d 454, 300 N.E.2d 616 (2d Dist. 1973), reversed damages for lack of evidence, not for unrecoverability as a matter of law (App. 284). Defendants' other cases are Illinois Appellate Court decisions from 1932 and 1908.

[35] See *e.g. John D. Copanos & Sons, Inc.* v. *McDade Rigging and Steel Erection Co.*, 43 Md. App. 204, 403 A.2d 402 (1979); *Perma Research & Development Co.* v. *Singer Co.*, 402 F. Supp. 881 (S.D.N.Y. 1975), affirmed, 542 F.2d 111 (2d Cir. 1976), certiorari denied, 429 U.S. 987 (applying New York law).

damages to the jury" (*Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 293 (7th Cir. 1969), certiorari denied, 396 U.S. 902), and that "determinations [of tort damages] did not have to be based on mathematical certainties" (*Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982, 991 (7th Cir. 1976)).

Thus Judge Will's instruction, allowing the jury to consider reasonable approximations and estimates, is consistent with Illinois tort law. Furthermore, defendants' selective quotations from the instructions fail to reveal that Judge Will also told the jury—in the same breath—that there must be a "sufficient basis in the evidence from which your estimates may be inferred" and that it could not award damages "based on pure speculation, guess work, or conjecture." Damages had to be "reasonably established by the plaintiffs by a preponderance of the evidence." (Indep. Br. 87).

Viewing the instructions as a whole, we conclude that the district court did not err in equating federal antitrust damages with damages for tortious inducement under Illinois law.

B. The Sufficiency of the Damage Evidence

Defendants urge that the jury awards of $2,499,009 on the antitrust and tortious inducement of Yoder's breach of contract counts are not supported by the evidence. They make a similar—but more cursory—argument about the $15,000 awarded on Counts IV and V (Regal's interference with the Independence-Deere relationship and Regal's commercial defamation.)[34] We find the proof adequate to support both awards.

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[34] Defendants assert in n.28 of their principal brief and n.21 of their reply brief that the evidence did not support an award of $15,000 against Regal. However, the evidence showed that Regal salesman Harry Bishop told Doris Lang, an assistant Deere buyer for structural steel tubing, that Independence was not a reliable source of tubing because it was in financial trouble, unable to borrow money or pay its creditors. These statements, though untrue, were repeated on three or four occasions. As a result of

(footnote continued on next page)

We note at the outset that there is a limit to the exactness the defendants can demand. Not only are reasonable projections and estimates generally acceptable, as indicated above, but a defendant whose actions contribute to the difficulties of accurate measurement is in a poor position to demand precision. Instead the factfinder may act on probability and inference. See *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*, 633 F.2d 477, 484 (7th Cir. 1980) and *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir. 1970), certiorari denied, 400 U.S. 1020, both cases in which we followed the Supreme Court's lead.[37] As already mentioned, Judge Will was more cautious in instructing the jury, however (Indep. Br. 87).

Defendants' attack on the expertise of Independence's chief damages witness is misguided. At the time he testified Albert Madansky was a professor at the University of Chicago Business School, specializing in econometrics, statistics and marketing. His *curriculum vitae* fills four pages of the record (App. 704-707) and documents his extensive academic and business experience and his familiarity with the use of statistical methods to analyze business problems. Indeed he has appeared as an expert witness in other Sherman Act cases. Defendants' only definite objection to Dr. Madansky is that he is not an economist, but his methodology and its critical assumptions were supported by just the sort of expert defendants desiderate: Dennis Carlton, a professor on the economics faculty at the University of Chicago.

Dr. Madansky used a "pull-back" analysis. First he examined actual demand, price, and cost of manufacture in the

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(footnote continued from preceding page)

them, Ms. Lang did not recommend a hitherto planned increase in Deere's purchases from Independence. The jury awarded Independence $15,000 of the $30,000 it had sought on the Deere claims.

[37] See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100; *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 327 U.S. 251; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555; *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U.S. 359.

steel tubing market in the damages period. Then he worked out Independence's actual growth and market share in the first two years of its operation and compared it to the industry situation in the damage period to establish what Independence's performance would have been had its entry into the market not been delayed. This methodology has been endorsed by the Supreme Court (note 37 *supra*) and by us in *Trabert & Hoeffer, Inc.*, and *Locklin, supra*. The Fifth Circuit in *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 580-581 (1980) concurs. Even defendants acknowledge the general acceptance of the theory (Br. 69).

The defendants' main argument is that there were drastically different market conditions in the steel tubing market in the base period and the projection period. The only such difference they identify, however, is a shortage of steel in 1974. That was addressed in the evidence: Regal's purchasing agent testified that it was able to obtain 70% of its steel needs in 1974; the vice president of Welded Tube Company said his company got 80% of its requirements; and Bureau of Census information and defendants' own expert estimated that the industry as a whole operated at 85-89% of capacity (Indep. Br. 82). Furthermore, allocations during the shortage were based on prior purchases. Independence showed that it had had an offer for 2,000-3,000 tons per month from the fall of 1973 through the end of 1974—which the loss of the Yoder mill forced it to forego (*id.*). It also showed that U.S. Steel, which handled Independence's account once it began production, had an abundance of steel in 1973 (*id.* at 83). There is nothing in this evidence that is inconsistent with Dr. Madansky's assumption that Independence could have obtained 50,000 tons of steel in 1974 (Def. Br. 71).

Defendants also argue that Independence's calculations improperly assumed Independence could charge "premium prices" during 1974. On the contrary the price data used were Independence's actual prices for the last two quarters of 1974 and figures based on government and private sources for earlier quarters, with appropriate seasonal adjustments in

both cases. Both the extrapolated and the actual prices were significantly below prevailing industry prices. (Indep. Br. 83).

The defendants object to the assumption that Independence could have produced 264 tons of steel tubing in December 1973 and that it could have operated at 70% of capacity within five months of starting production. There was evidence to support both propositions. Yoder's delivery of the mill could not be later than December 1973 without exposing Yoder to a $250,000 penalty. In fact just before Yoder's final cancellation, the mill was two to three months ahead of schedule. (Indep. Br. 80). The tonnage figure was based on Independence's actual experience in the first month (September 1974) it installed and used the Abbey Etna mill. The five-month figure was a conservative estimate: Independence's actual start-up time with the Abbey Etna mill was only three months. Both assumptions are therefore supported by Independence's records and Grohne's testimony.[38] The 70% figure is also borne out by Independence's performance and by the evidence about the capacity of industry in general and Independence's competitors in particular (pp. 36-37 supra).

Defendants' final sally is that the overall evidence in this case was as inadequate as the evidence in *Pacific Mailing Equipment Corp.* v. *Pitney Bowes, Inc.*, 499 F. Supp. 108 (N.D. Cal. 1980). The situations are not at all parallel. There the

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[38] Defendants want to discount Grohne's testimony and any of Dr. Madansky's assumptions that were based on it. In the first place, there was ample corroborative evidence from government and industry records, the testimony of suppliers, customers, and competitors, and even from defendants' experts. In the second, it was the jury's province to decide what weight and credibility to attach to Grohne's testimony in view of his interest. *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 580 n.11 (5th Cir. 1980); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 507 n.41 (9th Cir. 1977), certiorari denied, 434 U.S. 1040.

plaintiff sought to present lost profits evidence based on "pro forma profit and loss statements, entirely unannotated and totally failing to reflect their source or the underlying computations" (499 F. Supp. at 118), and on wholly hypothetical assumptions that (1) in an unrestrained market 50% of the mailing machines sold would be used machines, (2) plaintiff would have a 25% share of the used-machine market, (3) Pitney Bowes would not try to sell used machines, (4) Pitney Bowes' overall market share would decline from 90% to 50%, and (5) all this change would be accomplished without affecting price. *Id.* at 119, 120 n.3. Independence's damage case, including the testimony of Grohne, was wholly different. It involved exactly the "supporting studies, analyses, comparisons, [and] other factual, objective, observed or verifiable data" that the *Pacific Mailing* court lacked but would have found sufficient, *id.* at 119.

There is one last, but important, point overlooked by defendants. Independence's damage evidence was offered in support of lost profits totalling $8,298,245. The jury awarded less than a third of that amount ($2,499,099). That suggests that the defendants have already had the benefit of whichever of their contentions the jury found convincing. The defendants have not differentiated between the sufficiency of the evidence to support the damages as sought and its sufficiency to support the damages as found. We think the conservatism of the jury's verdict and the quantity and quality of the proof would make any such attempted distinction fruitless.

The judgments appealed from are affirmed in their entirety. Costs to appellees.

APPENDIX

Judge Will's charge (App. 156-158):

So, in order to find that a combination or conspiracy to violate the antitrust laws existed between Copperweld and Regal, you must find that the two companies, in fact, operated as separate entities. In making this decision, you should consider the following matters:

1. The history of the two companies, that is, whether they functioned as separate companies before they became affiliated;

2. Whether the two companies are run by separate management staffs;

3. Whether the two companies maintained separate corporate offices;

4. Whether the parent corporation pays the salaries, expenses, or losses of the subsidiary;

5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of his business. In this connection you should consider both the day-to-day operating decisions and the major or executive policy decisions;

6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries;

7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans;

8. Whether both companies were separate participants in the alleged unlawful activity complained of by Independence;

9. Whether both companies have common officers or directors. The existence of some common officers or directors does not alone render the two companies incapable of conspiracy.

You must consider all of the facts, and that includes the nine that I have given you here, and any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other.

Photovest's analysis, 606 F.2d at 726-727:

The evidence in the present case shows that Labs was separately incorporated to minimize potential for labor relations friction which might arise from the disparity in benefits between employees of photo processing labs and existing Fotomat personnel. The executive management of Fotomat overlapped that of Labs. Moreover, Labs did not maintain separate corporate offices. Profit-related compensation for Labs personnel was calculated solely in terms of the profitability of Fotomat rather than in terms of an appraisal of Labs' independent net income. For all external purposes, financial statements and tax return data were consolidated. In publicly circulated financial statements, all subsidiaries of Fotomat were lumped together with the parent and referred to simply as "the Company." Historically, Labs was formed to integrate photo processing services into Fotomat owned processing facilities and never existed for the independent purpose of establishing a processing business to service non-Fotomat customers. It acted merely as the processing arm of the enterprise.

In response to this substantial evidence that Fotomat and Labs were not separate entities for antitrust purposes, Photovest offers only two statements, one by Fotomat's in-house counsel in which he said that Labs has independent personnel, laboratories, machinery, equip-

ment, and costs and that it bills Fotomat just as independent processors do, and another by Fotomat's president in which he said that Labs "was a separate business and we elected to treat it as such." The fact that Labs billed Fotomat for processing and had separate costs, machinery, equipment, etc., is not very significant other than as evidence that separate accounting made for internal accounting clarity. And the isolated statement by Fotomat's president cannot be given great weight.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION**, a Pennsylvania corporation; **REGAL TUBE COMPANY**, a Pennsylvania corporation; **THE YODER COMPANY**, an Ohio corporation, *Defendants.*	No. 76 C 4201

MEMORANDUM OPINION

Copperweld and Regal have moved for entry of judgment n.o.v. or, in the alternative, for a new trial with respect to all of Independence's claims and their counterclaim. In their motion, they cite seven alleged substantive errors, 23 alleged errors in the Court's instructions to the jury, over 150 alleged evidentiary errors, and approximately 300 allegedly prejudicial remarks or rulings by the Court. In this opinion, however, we will address only those alleged errors that Copperweld and Regal believed were important enough to brief. Because the defendants' arguments are not meritorious, we deny their motions.

COUNT I: THE ANTITRUST CLAIM

Copperweld and Regal argue that they are entitled to judgment n.o.v. for the following reasons:

1) there is insufficient evidence that Copperweld and Regal had the capacity to conspire,

2) there is insufficient evidence that Copperweld and Regal actually conspired,

3) even if there is sufficient evidence of a conspiracy between Copperweld and Regal, there is no evidence that Regal was part of the conspiracy in February 1973, when Copperweld allegedly induced Yoder to breach its contract with Independence.

4) there is insufficient evidence of an unreasonable restraint of trade,

5) there is insufficient evidence of "antitrust injury" and

6) Copperweld and Regal's allegedly conspiratorial acts were constitutionally privileged.

Copperweld and Regal also argue that they are entitled to a new trial on the following grounds:

1) the improper jury instructions with regard to the criteria for determining whether related corporations can conspire,

2) the failure to instruct the jury that conduct consistent with legitimate business goals cannot support an inference of unlawful conspiracy,

3) the refusal to instruct the jury concerning geographic markets and submarkets,

4) the failure to instruct the jury that it could not find an unreasonable restraint of trade in the absence of evidence that the defendants' conduct affected price in the market,

5) the failure to instruct the jury that "antitrust injury" is not the equivalent of all injury proximately caused by the defendants' anticompetitive behavior,

6) the admission of Mr. Smith's testimony in the earlier *Imetal* litigation and Mr. Foster's affidavit during plaintiff's rebuttal evidence,

7) the admission of evidence relating to Copperweld's contact with various third parties prior to or after the alleged conspiracy between Copperweld and Regal,

8) the admission of Mr. Grohne's testimony as to his conversation with Abbey-Etna in December 1973,

9) the refusal to admit Mr. Jentes' testimony concerning the legal advice he gave Copperweld,

10) the admission of Mr. Grohne's and Mr. Bogolub's testimony regarding Independence's ability to secure steel, and

11) the refusal to admit data regarding Regal's share of the market.

Sufficiency of the Evidence

Most of the arguments advanced by Copperweld and Regal in support of their motion for judgment n.o.v.—that there is insufficient evidence to support the jury's verdict in several respects—are identical to the arguments they raised in support of their earlier motion for a directed verdict. In their briefs, Copperweld and Regal describe at length the evidence presented at trial in an effort to demonstrate its insufficiency. From their own recitation of the evidence, however, it is clear, as we found in denying their earlier motion, that there was sufficient evidence from which the jury could reasonably infer that Copperweld and Regal had the capacity to conspire, that they in fact conspired, that the conspiracy began prior to February 1973, that their actions resulted in an unreasonable restraint of trade, and that there was an injury to competition of the sort the antitrust laws were intended to prevent. Admittedly, the evidence in support of some of these elements is not overwhelming; however, it need not be. Moreover, Copperweld and Regal's description of the evidence is limited and highly selective. For the most part, they cite only the testimony of their own witnesses and refer only to their own exhibits. Accordingly, we find unconvincing Copperweld and Regal's argument that they are entitled

to judgment n.o.v. on the antitrust claim on the ground that there is insufficient evidence to support the jury's verdict.

Copperweld and Regal's argument that there is insufficient evidence to support the jury's finding that Regal was part of the conspiracy in February 1973 when Copperweld sent its warning letter to Yoder warrants additional discussion. The crux of their argument is that, since it is uncontested that Regal knew nothing about Copperweld's letter until several years later, Regal could not have been part of the "conspiracy" in February 1973, when the only damage to Independence occurred. If Regal was not part of the "conspiracy" at that time, there was no conspiracy in violation of the antitrust laws because no damage resulted from the conspiracy after February 1973. Copperweld and Regal overlook the principle that a conspirator is liable for all actions of its coconspirators taken in furtherance of the conspiracy, even those actions of which it is unaware. *See T.V. Signal Co. of Aberdeen* v. *American Telephone & Telegraph*, 1972 Trade Cases ¶ 74,061 (8th Cir. 1972). Thus, if Regal was part of a conspiracy to drive Independence out of the market at the time Copperweld sent its letter to Yoder, it is irrelevant that Regal was unaware of the letter itself. Having reviewed the evidence, it is clear that there is evidence from which the jury could reasonably infer that Regal was part of the conspiracy as early as February 1973.

Copperweld and Regal also argue that, by the Court's own logic, Regal could not be found to have been part of the conspiracy in February 1973. Specifically, they point to our statement that "[t]here's no evidence that Regal did anything which constituted tortious conduct towards Independence in connection with the Yoder contract." They also claim that the legal standard for determining whether there was a tortious interference with contract is identical to the standard for determining whether there was an antitrust violation in this case. Thus, they argue, if Regal was not a joint tortfeasor with Copperweld concerning the letter sent to Yoder, it is legally impossible for Regal and Copperweld to

be liable in damages as antitrust conspirators with respect to this letter. The problem with this argument is that the legal standard for determining liability for tortious interference with contract is *not* the same as the standard for determining whether there has been a conspiratorial violation of the antitrust laws. Whereas a defendant must have knowledge of the existence of the contract and of the specific act causing the breach to be liable for tortious interference with contract, *see Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 291 (7th Cir. 1969), *cert. denied*, 396 U.S. 902 (1969), a defendant need not have such specific knowledge to be liable for the breach of contract induced by his co-conspirators in violation of the antitrust laws, *see T.V Signal Co. of Aberdeen* v. *AT&T, supra* at ¶ 74,061. As mentioned earlier, a conspirator is liable for all actions of his co-conspirators taken in furtherance of the conspiracy, including those of which he has no knowledge. Thus, Copperweld and Regal's argument that there is insufficient evidence to support the jury's finding that Regal was part of the conspiracy at the time the only damage to Independence occurred is meritless.

Noerr-Pennington Defense

It is also clear that Copperweld and Regal's actions in furtherance of their conspiracy were not constitutionally privileged as they claim. The defendants argue that the only evidence supporting Independence's claim of an antitrust violation are the letters Copperweld's Mr. Smith wrote to a number of third parties suspected of doing business with Independence, and Copperweld and Regal's surveillance of Independence. According to the defendants, the uncontradicted evidence indicates that their sole purpose for engaging in these activities was to prepare for litigation and to notify third parties that Copperweld and Regal were contemplating seeking injunctive relief against Independence or Mr. Grohne. The notification was necessary, say the defendants, to obviate the risk that these third parties would defeat any future injunctive action by claiming that they were detrimentally affected by Copperweld and Regal's delay in bring-

ing suit. Thus, the defendants conclude, since these activities were directly related to their preparation of a possible lawsuit, and since such activities are protected under the First Amendment, they cannot be employed as a basis for finding an antitrust violation.

The Noerr-Pennington doctrine, named after *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), as originally formulated, "shield[ed] from the Sherman Act as a constitutionally protected right of petition a concerted effort to influence public officials, regardless of intent or purpose." *City of Mishawaka* v. *American Electric Co.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, U.S. (1981). Thus, where two or more persons or corporations banded together to assert their rights through court proceedings, their concerted activity was protected by the First Amendment. *Cf. California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

In recent years, however, the Noerr-Pennington doctrine has been narrowed to the extent that only concerted efforts to influence public officials that are undertaken for a lawful purpose are protected. In *California Motor Transport Co.* v. *Trucking Unlimited*, *supra*, the Court held that if, as the complaint alleged, the defendants' purpose in instituting state and federal agency and court proceedings was to defeat competitors' applications for operating rights, the Noerr-Pennington doctrine did not immunize them from antitrust liability. *Id.* at 515. If the end result of the defendants' actions was unlawful, said the Court, it is irrelevant that the means used to achieve that end were lawful. *Id.* at 515. Additionally, in *Citicorp* v. *Interbank Card Association*, 478 F.Supp. 756 (S.D.N.Y. 1979), the court held that where protected conduct is coupled with proscribed conduct the protected conduct does not legitimate the illegal activity. *Id.* at 762. *Cf. California Motor Transport Co.* v. *Trucking Unlimited*, *supra* at 514-15; *City of Mishawaka* v. *American Electric Co.*, *supra* at 982.

As far as the present case is concerned, the Noerr-Pennington doctrine does not preclude a finding of antitrust liability based on Copperweld and Regal's letter writing and surveillance campaign. There is sufficient evidence from which the jury could conclude that this campaign was not simply a prelude to the defendants' seeking injunctive relief against Mr. Grohne or Independence but "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, supra* at 144, and, therefore, not protected activity under the Noerr-Pennington doctrine. There is evidence of telephone calls between Mr. Smith and the president of Abbey-Etna in December 1973, regarding the sale of a mill to Independence, repeated contacts, between representatives of Copperweld and officials at Continental Bank and at First National Bank of Chicago concerning the banks' providing financing to Independence, contacts with real estate firms concerning their assisting Independence in finding plant space, contacts between Copperweld and prospective suppliers of steel and contacts with prospective purchasers of Independence's products. These activities have no relationship to Copperweld and Regal's alleged desire to preserve their standing to seek injunctive relief and, therefore, suggest that the defendants' true motivation in writing to Yoder was to keep Independence out of the structural tubing market or to hamper its ability to compete there. Thus, even if Copperweld and Regal's letter writing and surveillance are protected activities which might have been privileged, this does not legitimate an otherwise illegal scheme. *See City of Mishawaka* v. *American Electric Co., supra* at 982-83.

Capacity to Conspire

Turning to the arguments advanced by Copperweld and Regal in support of their motion for a new trial, the defendants first argue that we improperly instructed the jury with regard to the criteria for determining whether related corporations can conspire. The jury was instructed that, in

order to find that Copperweld and Regal conspired in violation of the antitrust laws, they first had to find that the two corporations "operated as separate entities." In this connection, the jury was instructed to consider:

> 1. The history of the two companies, that is whether they functioned as separate companies before they became affiliated;
>
> 2. Whether the two companies are run by separate management staffs;
>
> 3. Whether the two companies maintained separate corporate offices;
>
> 4. Whether the parent...pays the salaries, expenses, or losses of the subsidiary;
>
> 5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of its business. In this connection, you should consider both the day-to-day operating decisions and the major or executive policy decisions;
>
> 6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries;
>
> 7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans;
>
> 8. Whether both companies were separate participants in the alleged unlawful activity complained of...;
>
> 9. Whether both companies have common officers or directors, [although] the existence of some common officers or directors does not alone render the two companies incapable of conspiracy.

* * * * *

> [10.] [A]ny other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies....

Tr. 8472-74. Copperweld and Regal argue that this instruction ignores the dictates of *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 455 U.S. 917 (1980), in that it erroneously fails to mention three of the relevant factors listed by the court in *Photovest* and includes factors that the *Photovest* court apparently did not consider relevant. Specifically, the defendants claim that the instruction fails to tell the jury to consider "the extent of the integration of ownership,...the extent to which significant efficiencies would be sacrificed if they were required to act as two firms,...[and] the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms." *See id.* at 726. The defendants also claim that factors 3 through 8 in our instructions are irrelevant.

Contrary to the defendants' assertion, however, the court in *Photovest* did not suggest that the factors it listed were the only factors relevant to a determination of whether related corporations could conspire, or that the factors listed would be relevant in evey case. Indeed, the court specifically stated that those mentioned were only "some" of the relevant factors, and that the fact finder "must decide each case on its particular facts." Thus, the jury's failure in this case to consider some of the factors listed in *Photovest* and its consideration of additional factors is not forbidden by *Photovest*.

Additionally, some of the factors which we instructed the jury to consider are ones which the court in *Photovest* in fact considered, even though it did not include them in the particular list on which Copperweld and Regal now rely. After mentioning several relevant factors, the court in *Photovest* embarked on a discussion of whether the two related corporations in that case could conspire. In the course of its discussion, the court expressly noted that the two corporations did not maintain separate corporate offices, that employment compensation was calculated and paid differently in

each corporation, that the business, tax and financial records of the two companies were consolidated, and that the two corporations did not generate substantial business from outsiders. *See id.* at 726-27. Thus, contrary to the defendants' contention, factors 3, 4, 6 and 7 in our instructions are entirely consistent with *Photovest*. Finally, the remaining factor listed in our instructions—whether the two corporations make their own operating and policy decisions—is one which courts in other circuits have found helpful to a determination of whether related corporations can conspire.[1] *See, e.g., Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 453 (9th Cir. 1979). We simply tailored the jury instructions regarding the criteria for determining whether related corporations can conspire to the facts in this case, rather than duplicating exactly the suggested criteria in *Photovest*. This is entirely consistent with *Photovest* and not error.

Conduct Consistent with Legitimate Business Goals

Copperweld and Regal argue, second, that they are entitled to a new trial because we failed to instruct the jury that conduct consistent with legitimate business goals cannot support an inference of unlawful conspiracy. Contrary to Copperweld and Regal's assertion, however, conduct consistent with one's economic self-interest *can* support an inference of unlawful conspiracy. *See, e.g., First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 277 (1968) ("[A] jury question might well be presented as to Cities' motives in not dealing with Waldron, . . . notwithstanding that such a failure to deal conceivably might also have resulted from a whole variety of non-conspiratorial motives involving the exercise of business judgment . . . ."); *Feminist Women's*

[1] The court's failure in *Photovest* to mention these remaining factors may be due to the record in that case which, the court specifically noted, was seriously incomplete. It is possible that the court had no information regarding how the two firms; major policy decisions and day-to-day operating decisions were made. If so, its failure to list these factors as important is not a significant omission.

Health Center, Inc. v. *Mohammad*, 586 F.2d 530, 546 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

Furthermore, the only authority Copperweld and Regal have mustered for their position, when viewed in context, is hardly unequivocal support. In *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978), the court stated that "[o]nly where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, . . . may an [unlawful] agreement be inferred from such parallel action." *Id.* at 884. In that case, however, the plaintiff charged a film distributor with participation in a bid-rigging conspiracy. The conspiracy was initiated by various theater owners in the hope that they could lease films at a lower price than they had under a freely competitive bidding system. The only evidence of the distributor's participation in the conspiracy was its acceptance of the theater owners' rigged bids. Thus, in *Admiral Theatre Corp.* it was not simply that the film distributor's actions were consistent with its self-interest but also the fact that the distributor's actions were not unusual in any respect and that there was no other evidence of participation in the conspiracy which led the court to affirm the district court's directed verdict in the distributor's favor. *See also H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978). *Admiral Theatre Corp.* is not, therefore, support for the defendants' theory that conduct consistent with the actor's legitimate business goals can never support an inference of unlawful conspiracy. Consequently, failure to give an instruction consistent with their theory was not error.[2]

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[2] Copperweld and Regal also contend that the Court erred in refusing to instruct the jury that "apparently legitimate business reasons for implementation of a policy or course of conduct are to be taken into account" in determining whether a defendant participated in an unlawful conspiracy. The defendants' complaint is

(footnote continued on next page)

Jury Instructions Regarding Relevant Markets

Copperweld and Regal argue that the Court erred in refusing to instruct the jury as they requested concerning geographic markets and submarkets. They do not state in what way the Court's charge regarding geographic markets is incorrect or what a proper instruction would have included. Moreover, the instruction regarding geographic markets actually given was based on the defendants' requested instruction, although it is shorter, simpler and less repetitive than that requested. *See* Tr. 8478.

Equally unmeritorious is the defendants' claim that the Court's instruction regarding submarkets was incorrect. They claim that our instruction erroneously allowed the jury to find that a tubing submarket existed even though buyers sometimes used tubing and other structural shapes for the same purpose. The jury was instructed that product submarkets exist in some cases and that " the uniqueness of the product and its uses," Tr. 8479, is the most significant indication of a product submarket. The instruction further noted that "[i]f buyers interchange products for the same uses, [the products] are considered to be in the same market." Tr. 8479. Our instruction differs from the defendants' tendered instruction only in that we refused to tell the jury that a complete lack of interchangeability was a prerequisite to a finding of a product submarket. In fact, however, complete lack of interchangeability is not necessary. *United States* v.

(footnote continued from preceding page)

baseless, however, since we gave such an instruction, albeit in slightly different language:

> A person can adopt a policy or take an action based upon his own individual free choice and prompted by the desireability of the policy or action from his own business point of view. To do this is to exercise a businessman's right to decide for himself the terms on which he will do business and does not necessarily constitute the formation of or a participation in a combination or conspiracy.

Tr. 8466.

Grinnell Corp., 384 U.S. 563, 574 (1966); *United States* v. *Aluminum Company of America*, 377 U.S. 271, 275 (1964); *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 30 (3rd Cir. 1978). Thus, the jury instructions regarding geographic markets and product submarkets were correct.

Unreasonable Restraint of Trade—Requirement of Affect on Price

Copperweld and Regal assert that the Court erred in failing to instruct the jury that it could not find an unreasonable restraint of trade in the absence of evidence that the defendants' conduct affected price in the market. Interestingly, but not surprisingly, the defendants have cited no cases supporting this novel theory. It is well established that an unreasonable restraint of trade occurs whenever "[a] restraint . . . tends or is reasonably calculated to prejudice the public interest." *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798, 810 (7th Cir. 1980), *cert. denied*, U.S. (1981). The public interest is prejudiced when prices are fixed or regulated, production is limited or parcelled out unfairly, or the quality of goods deteriorates. *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Thus, it is not necessary, as the defendants contend, for the plaintiff to prove that the defendants' conduct affected prices in the marketplace.

"Antitrust Injury"

The defendants' fifth contention is that the Court failed to instruct the jury that "antitrust injury" is not simply the equivalent of all injury proximately caused by the defendants' conduct. Their argument in this respect is rather confused and seems actually to be an amalgam of several different contentions, each of which deserves individual discussion.

First, Copperweld and Regal argue that there was insufficient evidence to support a finding that Independence's exclusion from the market injured competition. Although, as

mentioned earlier, the evidence of injury to competition was less than overwhelming in this case, there was sufficient evidence presented at trial from which the jury could reasonably conclude that competition was impaired for a period of time as a result of the defendants' conduct.

Copperweld and Regal also argue, in a very vague fashion, that the damages Independence sustained bear no relationship to the injury to competition. According to the defendants, an antitrust plaintiff can only recover those damages which are a "particularized manifestation" of the injury to competition. The cases they cite do not support this proposition, however. Rather, these cases simply hold that an antitrust plaintiff cannot recover anything unless there is proof of injury to competition—something which was missing in the particular cases. *See Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, 615 F.2d 343, 353-54 (5th Cir. 1980), *cert. denied*, U.S. (1981); *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133, 1136 (5th Cir. 1979), *rev'd*, U.S. (1981); *North American Soccer League* v. *National Football League*, 505 F.Supp. 659, 677-78 (S.D.N.Y. 1980) (no injury to competition because there was no competition). The jury in the present case was instructed that it had to find an injury to competition in order to find the defendants guilty of violating the antitrust laws. See Tr. 8480.

Finally, the defendants raise for a second time their argument that there is no evidence suggesting Regal knew about Copperweld's letter to Yoder in February 1973. Regal, they urge, was therefore not part of an unlawful conspiracy at that time, and Independence cannot collect damages stemming from Yoder's breach of contract in the absence of a conspiracy. But, again, the defendants have ignored the principle that Regal's ignorance of the letter is not determinative of whether Regal was part of the conspiracy in Febrary 1973, and that, if Regal was part of a conspiracy, it is liable for its co-conspirator's actions regardless of whether or not it knew about them.

Mr. Smith's Imetal Testimony

According to Copperweld and Regal, the Court violated the hearsay rule in admitting Mr. Smith's testimony in the *Imetal* proceedings. This testimony was to the effect that Copperweld and Regal operated substantially independently of one another; it was relevant, therefore, to whether or not Copperweld and Regal had the capacity to conspire. Under F.R.E. Rule 804(b)(1), Mr. Smith's testimony would have been admissible in the present litigation if Mr. Smith was unavailable to testify and if Copperweld "had an opportunity and similar motive [during the first trial] to develop the testimony by direct, cross or redirect examination." Neither of these requirements was met, according to the defendants, so the admission of Mr. Smith's *Imetal* testimony was error.

As for Mr. Smith's availability, Copperweld and Regal argue that since Mr. Smith testified twice at the trial--once during the plaintiff's case and once during the defendants' case—Independence had two opportunities to question him with respect to the substance of his *Imetal* testimony. They concede that he wasn't available to testify during the plaintiff's rebuttal, when the *Imetal* testimony was introduced, but his unavailability at that point, they assert, was due principally to Independence's failure to request his presence in advance of the time it wanted him to testify.

As for Copperweld and Regal's opportunity and motive to develop Mr. Smith's testimony in *Imetal*, Regal argues that, since it was not a party to the prior litigation, it clearly had no opportunity to develop this testimony. In some similar cases, courts have excluded testimony from prior proceedings. *See, e.g., Government of the Canal Zone* v. *Pinto*, 590 F.2d 1344, 1353-54 (5th Cir. 1979); *First National Bank* v. *National Airlines, Inc.*, 22 F.R.D. 46, 48 (S.D.N.Y. 1958). Copperweld, on the other hand, argues that, while it had the opportunity to develop fully Mr. Smith's testimony in *Imetal*, it did not have a motive for doing so. Its argument is based on the general distinctions between the preliminary injunction proceeding in *Imetal* and the present litigation. Although

Copperweld does not say so, the real difference between its motive in *Imetal* and its motive in the present case is that in *Imetal* it was in Copperweld's best interest to establish that Copperweld and Regal operated independently of each other, whereas in the present case it was in Copperweld's best interest to endeavor to establish the opposite. Under Rule 804(b)(1), however, whether a party had a similar motive for developing testimony turns not on whether the party's interests in the contents of the testimony change from one proceeding to the next but on whether the testimony concerns issues important to both proceedings. *Cf. Oberlin* v. *Marlin American Corp.*, 596 F.2d 1322, 1329 (7th Cir. 1979).

In the instant case, it is clear that Mr. Smith's testimony in the *Imetal* proceedings related to an issue important in both proceedings. Moreover, a great deal of evidence was presented with respect to Copperweld and Regal's capacity to conspire, of which Mr. Smith's *Imetal* testimony was only a small part.

Copperweld and Regal also contend that Mr. Foster's affidavit, concerning the relationship between Copperweld and its wholly owned subsidiary, should not have been admitted into evidence during the plaintiff's rebuttal. Specifically, the defendants argue that it was improper rebuttal evidence because it is not inconsistent with Mr. Foster's earlier testimony in the case. While this is arguable, if, as the defendants contend, the affidavit is not inconsistent with Mr. Foster's earlier testimony, it was merely cumulative and not prejudicial.

Evidence of Copperweld's Contacts with Third Parties Before and After the Conspiracy

Copperweld and Regal object to the admission of evidence relating to their dealings with third parties, such as the Continental Bank, U.S. Steel, and Abbey-Etna. They argue that, since these contacts with firms took place from late 1973 through early 1976, they are not particularly probative of

Copperweld's and Regal's intent in February 1973, when the defendants allegedly conspired.

First, the evidence of Copperweld and Regal's dealings with third parties is relevant to the issue of their purpose and intent in their dealings with Yoder. That the evidence of these contacts in later years has, in the defendants' opinion, "little probative value" on the issue of their intent in earlier years was a matter for them, as they did, to argue to the jury; it is not a valid reason for refusing to admit the evidence. Moreover, as Independence points out, the conspiracy was alleged to have extended from early 1973 through late 1976. Thus, evidence with respect to the defendants' conduct throughout this period was not only admissable but relevant to the plaintiff's case.

Mr. Grohne's Memorandum of January 15, 1974

The defendants further contend that the admission of Mr. Grohne's memorandum of January 15, 1974, was a "glaring evidentiary error." This memorandum memorializes a conversation between Mr. Mullen of Abbey-Etna and Mr. Grohne in which Mr. Mullen allegedly stated that, on December 13, 1973, Mr. Smith had tried to convince him that it would be illegal for Abbey-Etna to furnish Mr. Grohne with a mill. The defendants argue that this memorandum is hearsay which is not admissible under any exception to the hearsay rule.

The memorandum was admitted into evidence under F.R.E. Rule 803(24), which provides that a hearsay statement not specifically covered by any of the other exceptions to the rule but having "equivalent circumstantial guarantees of trustworthiness" is admissible if the court determines that it is offered as evidence of a material fact, is more probative on the point for which it is offered than any other evidence reasonably available, and if "the interests of justice will best be served by admission of the statement into evidence." We conducted a hearing regarding the memo's admissibility. The arguments the defendants now raise are essentially the

same as those they asserted at the hearing: that because the memorandum was prepared by a party its accuracy is inherently suspect and that, since Mr. Mullen, Mr. Seamans and Mr. Smith testified at trial about their conversation in December 1973, the memorandum was not more probative than other evidence of what was said at the time. We concluded after the hearing that it was admissible under Rule 803(24).

Whether or not the document should have been admitted, however, its admission clearly was not serious error. First, it is not the only evidence that Copperweld's Mr. Smith spoke with Mr. Mullen at Abbey-Etna about the latter's furnishing Independence with a mill. Mr. Mullen, Mr. Smith and Mr. Seamans all testified that such a conversation took place. It is also not the only evidence of what was discussed; Mr. Mullen's, Mr. Smith's and Mr. Seaman's testimony corroborated the memorandum in most respects. The only significant difference between these individuals' reports of their conversation and the report of it in the memorandum is that the memorandum states that the conversation was heated and that Mr. Smith was vehement in his attempt to convince Mullen that selling a mill to Independence would be inadvisable. Thus, since the memorandum adds little to the other testimony regarding the December 13, 1973 conversation, its admission could not have seriously prejudiced the defendants.

Second, the memorandum concerns only collateral issues in this case. Independence did not seek damages based on anything the defendants said or did to Abbey-Etna. Independence introduced the memorandum in order to show that Copperweld threatened Abbey-Etna, as well as others such as the Continental Bank, in order to establish a course of improper conduct on the defendants' part, thereby to prove that the defendants intended to keep Independence out of the market. The evidence with respect to Copperweld's dealings with Abbey-Etna is but a small link in this chain.

Exclusion of Mr. Jentes' Testimony

The defendants next argue that the Court erred in excluding from evidence Mr. Jentes' testimony concerning the advice he allegedly gave Copperweld about a possible suit against Independence or Mr. Grohne. We excluded this testimony after a voir dire hearing on the grounds that it was conclusory, argumentative, cumulative, and most important, irrelevant. The defendants have not stated specifically their objection to our ruling, and we assume it is not a serious one.

Testimony Concerning Independence's Ability to Secure Steel in 1973 and 1974

Copperweld and Regal argue that under F.R.E. Rule 701, Mr. Grohne and Mr. Bogolub should not have been permitted to testify as to their opinions on how much steel Independence could have secured during the steel shortage. Rule 701 provides, in relevant part, that a lay witness may give his opinion on a subject only if his opinion is based on his own perceptions and is helpful to "the determination of a fact in issue." Mr. Grohne's and Mr. Bogolub's testimony, however, was not based on first-hand knowledge or observation according to the defendants.

With respect to Mr. Grohne's testimony, the defendants argue that his opinion could not have been based on first-hand knowledge, since he admitted that he did not know how steel producers made allocation decisions and since he did not purchase any steel during the shortage. With respect to Mr. Bogolub's testimony, the defendants argue that his opinion could not have been based on first-hand knowledge, since it was based on the assumption that he could have obtained a substantial amount of steel from Spain—an assumption that was allegedly disproved by uncontradicted government import statistics. That Mr. Bogolub and Mr. Grohne may not have had first-hand knowledge of *all* facts relevant to an opinion on how much steel Independence could have procured does not disqualify them from expressing their opinions on this subject. *See Bassett Furniture*

Industries of North Carolina, Inc. v. *NVF Co.*, 576 F.2d 1084, 1091 n.4 (5th Cir. 1976), *amended in other respects*, 583 F.2d 778 (5th Cir. 1978). The extent to which Mr. Bogolub and Mr. Grohne may have overlooked or been ignorant of certain facts or made dubious assumptions relevant to their conclusions was a matter for the defendants to argue, as they did, and the jury to consider in judging the two witnesses' credibility. *See id.* at 1091 n.4. Additionally, as far as Mr. Bogolub's testimony is concerned, the defendants' argument that his opinion was based on an undeniably false premise is unconvincing. The fact that no steel of a particular type was imported from Spain during 1973 and 1974, though substantial quantities of other types were, does not necessarily disprove Mr. Bogolub's testimony that he *could* have imported Spanish steel for Independence to use during those years. Thus, the admission of Mr. Bogolub's and Mr. Grohne's opinion testimony was not error.

Market Share Evidence

Copperweld and Regal contend finally that the Court erred in excluding evidence of Copperweld and Regal's market share, since this evidence was not only relevant but determinative of whether or not there was an unreasonable restraint of trade. Specifically, they assert that unless it is established that a defendant has a near-dominant share of the market and uses unfair means to eliminate a competitor, thereby creating the risk of a monopoly, there is no unreasonable restraint of trade. The defendants intended, they urge, to introduce evidence that they did not enjoy a dominant position in the market and, therefore, could not have unreasonably restrained trade.

First, as Independence points out, Copperweld and Regal were allowed to present evidence of their market share. The evidence they claim was improperly excluded would, therefore, have been redundant.

Second, contrary to the defendants' assertion, proof that the defendants enjoyed a near-dominant position in the

market is not a prerequisite to a finding that the defendants' conduct unreasonably restrained trade. The cases on which Copperweld and Regal rely are inapposite.

In *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980), the plaintiff, who had previously been the exclusive supplier of coal for the TVA but was unsuccessful in bidding for a later contract, brought an antitrust action under section 1 of the Sherman Act against the successful bidder, claiming that the defendant, along with its subsidiaries, had engaged in unfair practices "with the purpose of establishing [itself] as a dominant marketer of competitive sources of energy. . . ." The court concluded that proof that the defendants enjoyed substantial market power before the allegedly anticompetitive conduct and that this market power increased afterwards was a necessary part of the plaintiff's case. *Id.* at 558. In the absence of any allegations in this regard, the court concluded that the plaintiff had failed to state a claim. *Id.* at 559. Several of the other cases on which Copperweld and Regal rely involve similar factual situations, where an exclusive supplier or distributor of a particular product in a particular area is replaced by someone else and claims that his replacement violates section 1. *See, e.g., Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1978).[3] These cases differ markedly from other antitrust cases in the sense that the plaintiffs in these cases could not rely on factors traditionally used to establish

[3] The other cases on which Copperweld and Regal rely simply do not support the proposition for which they are cited. *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 32 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978), states that evidence of market share is relevant, but it does not state that such evidence is necessary to a determination of whether there is an unreasonable restraint of trade. *Robert's Waikiki U-Drive, Inc.* v. *Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199, 1219 (D. Hawaii 1980), concerns section 2 of the Sherman Act, not section 1, and is, therefore, irrelevant to the present case.

that a restraint is unreasonable; there was no reduction in the number of competitors (the plaintiff in each of these cases remained in business), no change in the quantity or quality of goods in the market, and no change in the price of goods as a result of the substitution of one distributor or supplier for another. In apparent recognition of the uniqueness of these cases, courts have held that, unless the former supplier or distributor can establish that the new supplier or distributor was a dominant force in the market before the substitution and has achieved near-monopoly power as a result of the substitution, there is no unreasonable restraint of trade. *See Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp., supra* at 1005-06; *Havoco of America, Inc.* v. *Shell Oil, Inc., supra* at 558-59; *Northwest Power Products, Inc.* v. *Omark Industries, Inc., supra* at 90.

Nothing in these cases suggests that where, as in the present case, the factors traditionally relied upon in determining whether a restraint is unreasonable are present, the plaintiff, in order to prevail, must also establish that the defendant increased its dominance of the relevant market. To require proof of market dominance in addition to evidence of other effects on competition would be to engraft section 2 onto section 1 of the Sherman Act. Furthermore, there are innumerable cases in which courts have found an unreasonable restraint of trade without proof that the defendants enjoyed a dominant position in the market. Consequently, the defendants are incorrect in their assertion that a plaintiff must prove that the defendants enjoyed both a dominant share of the market before the allegedly unlawful conduct occurred and a near-monopoly power thereafter. Similarly, Copperweld and Regal are mistaken in their contention that they could have successfully defended in the present case simply by establishing that they did not enjoy a dominant share of the market prior to 1973 and that they subsequently posed no threat of monopolization. The exclusion of additional evidence regarding the defendants' market share, therefore, was not error.

COUNT III. THE TORTIOUS INTERFERENCE CLAIM

Copperweld seeks judgment n.o.v. on the ground that the conduct on which liability is based was privileged, since its letter to Yoder was sent in a good faith attempt to protect a legally recognized interest that it believed might otherwise have been impaired.[4]

> 1) that the Court erroneously instructed the jury that Copperweld's conduct was privileged only if its primary purpose was to protect a legally recognized interest,
>
> 2) that the Court erroneously instructed the jury on how it was to ascertain Copperweld's "good faith" and "honest belief" or lack thereof, and
>
> 3) that the Court made erroneous evidentiary rulings and prejudicial comments in the presence of the jury thereby crippling Copperweld's attempt to establish that its February 19, 1973, letter to Yoder was not the cause of Yoder's breach of contract.

Privilege under § 773 of the Restatement of Torts

Section 773 of the Restatement (Second) of Torts provides:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Although no Illinois courts have expressly relied on this section of the Restatement, it probably accords with Illinois

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[4] Copperweld also contends that it is entitled to judgment n.o.v. because the conduct on which the tortious interference claim is based is privileged under the First Amendment. This argument was discussed earlier.

law. Illinois courts have frequently cited other sections of the Restatement concerning tortious interference with contract, including sections that deal with privileges. *See, e.g, Candalaus Chicago, Inc.* v. *Evans Mill Supply Co.*, 51 Ill.App.3d 38, 48, 366 N.E.2d 319, 326-27 (1st Dist. 1977).

Copperweld argues that the evidence, even when viewed in the light most favorable to Independence, establishes that, under section 773, it was privileged to induce Yoder to breach its contract with Independence. The legally protected interests Copperweld allegedly was preserving in writing to Yoder was its exclusive right to the trade secrets, confidential business information, etc., that it acquired from Lear Siegler. Moreover, according to Copperweld, its letter to Yoder was a proper means of protecting this right, its threat to protect its trade secrets was made in good faith, and it honestly believed that it might lose its trade secrets unless it informed Yoder of its intention to seek injunctive relief against Mr. Grohne or Independence.

As Independence points out, however, the jury could reasonably have concluded from the evidence in this case that Copperweld did not have any trade secrets, confidential business information, or other legally protected interest. It was uncontroverted that Mr. Grohne was not bound by any non-compete agreement and Copperweld introduced no evidence that it had any trade secrets or any other confidential information. Additionally, there was evidence that there were no trade secrets in the steel tubing industry. There also was evidence that Copperweld's so-called confidential information was not treated confidentially; there was testimony to the effect that the information was indiscriminately made available to all employees and that employees freely copied the allegedly confidential documents and removed them from Regal's plant long before Independence came into being.

Copperweld's argument that "the existence of a 'legally protected interest' under § 773 is established by [its] honest belief that its rights might be violated, even if that belief

was mistaken" is erroneous in three respects. First, it presupposes the existence of legally protected rights: it assumes that there are rights about which Copperweld can have an honest belief. Second, Copperweld's argument confuses two elements of section 773. The reference in that section to one's honest belief is not to one's belief that he has certain rights but to his belief that the rights, which he undeniably has, may be violated. In each of the cases on which Copperweld relies, there was a clearly recognized right which the defendant sought to protect; the only question was whether the defendant honestly believed that the right was in jeopardy. *See, e.g., Hahn & Clay v. A. O. Smith Corp.*, 320 F.2d 166, 169 (5th Cir. 1963); *Dinkins v. General Aniline & Film Corp.*, 214 F.Supp. 276, 280 (S.D.N.Y. 1962). Finally, even if one could establish that he has a legally protected interest simply by establishing that he honestly believed he had such an interest, there is evidence in this case—which is discussed in greater detail below—from which the jury reasonably could conclude that Copperweld could not honestly believe that it had any legally recognized right which it honestly believed it had to protect by its conduct.

As Independence also points out, the jury reasonably could have concluded from the evidence that Copperweld's alleged efforts to protect its rights were not undertaken in good faith. Evidence was presented at trial that Copperweld's own attorneys had told Copperweld that neither Mr. Grohne nor Independence was subject to a non-compete agreement. There was some evidence suggesting that Copperweld knew it had no trade secrets or confidential information that Mr. Grohne might use at Independence. More importantly, there was considerable evidence that Copperweld's purpose in writing to Yoder was not to protect its ability to secure an injunction against Mr. Grohne or Independence but to frighten or discourage Yoder from doing business with Independence in order to prevent or delay its entry into the market. Although, as Copperweld emphasizes, Mr. Smith and Copperweld's attorneys testified "distinctly and

unambiguously" that their sole purpose in writing to Yoder was to notify it of Copperweld's intention to seek injunctive relief, there is circumstantial evidence, as discussed later, from which a jury could conclude that Mr. Smith's testimony was untrue.

Finally, there is evidence in the record from which the jury could reasonably conclude that a third element of privilege was absent in this case: an honest belief that Copperweld's ability to secure an injunction against Independence or Mr. Grohne might be impaired unless it warned Yoder in advance of its intention to seek such relief. Counsel could cite no authority for the contention that Independence through Yoder could somehow defend against a claim that Copperweld's rights under its purchase contract with Lear Siegler would be irreparably damaged unless Independence was enjoined from competing with or using trade secrets of Regal. The contention that a creditor of a defendant in an injunction proceeding has either the standing or the right to challenge the issuance of an injunction against its debtor is apparently novel. Yet this is the only basis on which Copperweld could have honestly believed it had to send notices to possible suppliers and creditors of Independence. The jury could have concluded that Copperweld knew or should have known that such a warning was not a necessary, or even helpful, prelude to its seeking injunctive relief. For these reasons, therefore, we conclude that Copperweld is not entitled to judgment n.o.v. on the tortious interference with contract claim.

Copperweld's Primary Purpose in Writing to Yoder

Copperweld asserts that the Court erred in refusing to instruct the jury that, if it found that Copperweld acted with a proper business purpose in writing to Yoder, then it must find in Copperweld's favor on the tortious interference claim, regardless of whether Copperweld had other motives or purposes for writing to Yoder. In other words, Copperweld contends that the jury should have been told that, unless

Copperweld's sole motivation in writing to Yoder was to injure Independence, Copperweld's actions were not tortious.

The comments to sections 766 and 767 of the Restatement (Second) of Torts are helpful in resolving this contention. Comment j to section 766, the section that defines tortious interference with contract, states:

> The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, *even though he acts for some other purpose in addition.* [Emphasis added.]

Comment d to section 767, the section that sets out factors relevant to determining whether interference was improper, elaborates:

> In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.
>
> *The desire to interfere with the other's contractual relations need not, however, be the sole motive.* If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances. [Emphasis added.]

These comments indicate that it was not necessary, as Copperweld alleges, that Independence prove that Copperweld's sole motive in writing to Yoder was to injure Independence. In fact, the Restatement's comments suggest that our instruction that Independence had to prove Copperweld's principal purpose was improper placed a greater burden of proof on Independence than required by the Restatement. Consequently, our instruction concerning Copperweld's purpose in writing to Yoder was not erroneous.

"Good Faith" and "Honest Belief" Instructions

Copperweld contends that the Court erred in refusing to instruct the jury that they could find a lack of good faith—an essential element of Copperweld's asserted privilege under section 773—"only if you are satisfied that the sole and exclusive purpose for the letter was malicious, meaning that it was sent strictly to cause injury to the plaintiff." Copperweld also contends that the Court erred in refusing to instruct the jury that it need not find that Copperweld had a legally recognized right, which it attempted to protect when it wrote to Yoder about possible litigation, but that it need only find that Copperweld honestly believed that it had a legally recognized right. Copperweld's first argument is merely a rehash of its earlier argument regarding our instruction on Copperweld's motives. Furthermore, Copperweld's second argument fails for the reason discussed earlier in relation to its motion for judgment n.o.v.: Copperweld's "honest belief" is an issue only with respect to whether the rights it had were being violated, not with respect to whether it had any rights. Consequently, our refusal to instruct the jury on Copperweld's "good faith" and "honest belief," as Copperweld requested, was not error.

Prejudicial Comments and Rulings

Copperweld asserts that, but for numerous erroneous evidentiary rulings and prejudicial comments made by the Court in the presence of the jury, it would have been able to establish that Yoder breached its contract with Independence for financial reasons wholly unrelated to the letter it received from Copperweld. Although Copperweld lists the alleged errors and prejudicial comments it does not discuss them in any detail in its brief.

Most of the evidence which was excluded concerned Yoder's problems in securing adequate financing for the construction of the mill and Yoder's original underestimates of the costs of construction. The ground for exclusion of this evidence was that it was irrelevant. The evidence would

have tended to substantiate some of the testimony of Yoder officials that the company's cancellation of the contract was prompted in part by fear that the project was financially impracticable. Even if relevant, however, it would have been cumulative. Copperweld was allowed to introduce substantial evidence concerning Yoder's negotiations with banks for financing, the inaccuracy of cost estimates used in preparing bids, profit margins, borrowing limitations, escrow agreement requirements, progress payments, and so forth.

Additionally, the allegedly prejudicial comments are not prejudicial. Most of the "comments" cited by Copperweld were actually questions we put to witnesses. For example, Copperweld objects to our asking one witness, "what's the difference between cancelling an order and cancelling acceptance of an order?" and to our asking a Yoder officer, "between the $250,000 you were going to get from Capital Bank, plus stretching out the payment to suppliers, plus diverting some of the normal cash flow to the cost of building this machine, [you were] satisfied that they could build it. Isn't that right?" As Independence points out, "[t]he answers to the Court's questions, not the questions themselves, were the only statements prejudicial to Copperweld." The remaining comments do not reflect any bias or prejudice.

Furthermore, we gave a corrective instruction which should have minimized any possible prejudicial effect our comments and questions might have had:

> I have asked thousands of questions in almost twenty years as a judge, but each one of them was designed to help either the jury if there was a jury, or me if there was no jury. . . . And as frequently happens, and I think it happened in this case, sometimes I asked questions, the answers to which were helpful to the plaintiff; and sometimes I asked questions, the answers to which were helpful to the defendants. And I didn't know in advance which side they might be helpful to when I asked them, but I thought they would be helpful to you. They

> were questions which I would have asked if I were trying this case without a jury. . . .
>
> But do not attempt to draw any conclusions about my opinions of this case from the questions which I asked.

Tr. 8449-50. Consequently, there is no merit in Copperweld's argument that erroneous evidentiary rulings and prejudicial remarks by the Court prevented it from asserting a valid defense to the tortious interference charge.

Proximate Cause Instruction

Finally, Copperweld contends that the Court erred in failing to instruct the jury on proximate cause. This objection is somewhat mysterious, since the jury *was* instructed on what constitutes proximate cause. *See* Tr. 9508-10. Although the instruction came several pages after our general instruction on tortious interference with contract, we specifically stated that the definition applied to all claims in which proximate cause was an element. There is no basis, therefore, for Copperweld's objection in this regard.

COUNT VI: THE COMMERCIAL DEFAMATION AND TORTIOUS INTERFERENCE WITH A BUSINESS RELATION CLAIM

With respect to Count VI, Regal argues that the statute of limitations bars Independence's defamation claim. Normally, the statute of limitations begins to run when the alleged defamatory remarks are published. In some cases, however, Illinois courts have held that the statute of limitations does not begin to run until the person who is injured by the remarks learns or should have learned of the defamation. Regal points out that Ms. Lang, an employee of Deere Plow & Planter Works, testified that she first told Independence about the disparaging remarks in June or July, 1975. As a result, the one year statute of limitations began to run, according to Regal, in the summer of 1975 when Independence learned about the defamatory remarks and, thus, expired prior to Independence's bringing suit.

Regal's argument is defective in several respects. First, Regal ignores the fact that it stipulated early in the trial that Independence first learned of the defamation and the source of the remarks in December 1975, less than a year before this suit was filed. *See* Tr. 149. Second, even if one ignores the stipulation, it is not clear that Independence first learned of the defamation in the summer of 1975 as Regal contends. On the contrary, Ms. Lang testified that she told Independence at that time about rumors she had heard concerning its financial condition but she did not identify Mr. Bishop or any other Regal employees as the source of these rumors until December 1975. Thus, until December 1975, less than a year before it filed this action, Independence did not have enough information to enable it to file suit against Regal. Third, the jury found Regal guilty not only of defamation but of tortious interference with a business relationship, which is covered by a two-year statute of limitations. *See* Ill.Rev.Stats. Ch. 83, § 15. The damages arising from both claims are identical. Thus, regardless of whether the defamation charge is barred by the statute of limitations, the claim of tortious interference with a business relationship clearly is not, and Regal remains liable for the damages stemming from Mr. Bishop's false statements to Deere.

Regal also argues that the "discovery rule," which provides that the statute of limitations does not begin to run until the plaintiff discovers or should have discovered the defamation, should not be applied in the present case. Regal contends, although its contention is open to doubt,[5] that

[5] Regal cites only one case in support of its contention, *Kakuris* v. *Klein*, 88 Ill.App.3d 597, 410 N.E.2d 984 (1st Dist. 1980). In *Kakuris*, however, the issue was *not* whether or not the discovery rule should be applied to permit the plaintiff to bring an otherwise stale claim, but whether or not a new claim advanced in an amended complaint "related back" to the original complaint. *Id.* at 603, 410 N.E.2d at 988-89. Consequently, *Kakuris* does not support Regal's contention. We have found no Illinois cases in which a court refused to apply the discovery rule, although the court in *Tom Olesker's Exciting World of Fashion, Inc.* v. *Dun & Bradstreet,*

(footnote continued on next page)

whether the discovery rule should be applied in a particular case depends upon the facts of that case. Where the lapse of time between the alleged defamation and the plaintiff's discovery of it has prejudiced the defendants' ability to marshall evidence in support of his claim, application of the discovery rule to extend the statute of limitations would be inequitable. In the present case, however, Regal apparently was not prejudiced in its defense by the lapse of time. First, the lapse was not great—six or seven months at most. Second, although Regal places great emphasis on Ms. Lang's inability to remember Mr. Bishop's exact words, it concedes that she remembered the general substance of his remarks. It is unlikely that Ms. Lang's memory at the time of trial would have been significantly better had this suit been initiated six or seven months earlier. Thus, this is not a case in which it would be inequitable to apply the discovery rule. Moreover, even if we were to refuse to apply the discovery rule in this case and were to hold that the defamation claim was barred by the statute of limitations, Regal would remain liable for the damages Independence sustained as a result of Mr. Bishop's false statements by virtue of the jury's verdict on the tortious interference with a business relationship claim.

DAMAGES

Copperweld and Regal contend that they are entitled to a new trial on damages for the following reasons:

> (1) the admission of the testimony of Dr. Madansky, the plaintiff's principal witness on damages, was erroneous because he was not an expert and because his tes-

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(footnote continued from preceding page)

Inc., 61 Ill.2d 129, 334 N.E.2d 160 (1975), which first applied the discovery rule in a defamation case, hinted in dictum that the rule might not apply where the defendant's ability to defend was prejudiced by the passage of time. *Id.* at 137, 334 N.E.2d at 164.

timony was based solely on unfounded and uncorroborated assumptions, speculation, and conjecture,

(2) the refusal to instruct the jury that recoverable damages are limited to those directly traceable to "antitrust injury,"

(3) the refusal to instruct the jury on the degree of certainty to which damages must be proved, and

(4) the failure to instruct the jury about treble damages.

Copperweld and Regal further contend that they are entitled to judgment n.o.v. with respect to damages because:

(1) lost profits from a new business are too speculative to be allowed as an element of damages, and

(2) there is no basis in the record for an award of damages in this case.

Dr. Madansky's Testimony

Copperweld and Regal contend that Dr. Madansky, Independence's principal witness on damages, should not have been permitted to testify because he is not an expert and because his testimony was based solely on unfounded assumptions and speculation. With respect to Dr. Madansky's expertise, the defendants assert that he is not an economist but a statistician, and that he has had no previous experience with the structural steel tubing industry. With respect to the basis for Dr. Madansky's testimony, the defendants question the logic of his "pull back" or "before and after" methodology. This methodology is based on the assumptions that the development of a firm's market share and production level relative to the rest of the industry will follow the same pattern no matter when the firm enters the market and that, therefore, the history of an established firm's development can be used to predict how it would have developed had it entered the market sooner than it did. The defendants charge that this methodology frequently has been disap-

proved as too speculative. The defendants also challenge the foundation for several of Dr. Madansky's other assumptions.

That Dr. Madansky is a statistician, or, more accurately, an econometrist, rather than an economist does not make him any less of an expert on damages. Additionally, Dr. Madansky's lack of experience with the structural steel tubing industry does not disqualify him as an expert.

The defendant's complaints with regard to the bases for Dr. Madansky's testimony also are not grounds for excluding his testimony. Contrary to the defendants' assertion, Dr. Madansky's methodology has not been disapproved as too speculative[6] but, rather, it or variations on it have been used frequently in antitrust cases. *See, e.g., Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 580-81 (5th Cir. 1980). Furthermore, there is evidence in the record to support the assumptions on which Dr. Madansky relied in making his projections; there is evidence that the Yoder mill would have been delivered by December 1973, that Independence would have produced 264 tons its first month of operation, that the "start-up" time was five months, that Independence could have secured sufficient steel in 1973 and 1974, that Independence would have maintained a full, trained staff by

[6]The cases which the defendants cite as support for the proposition that the "before and after" or "pull back" methodology has been disapproved are miscited. In *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975), the court concluded that there was insufficient evidence to support the jury's verdict on damages not because the plaintiff's expert had used a "pull back" methodology for estimating damages but because the expert had made no effort to ascertain whether the lost profits the plaintiff had suffered were due to unlawful competition or to lawful competition. *Id.* at 1353. The court specifically approved the expert's methodology, stating that "[u]se of projections is entirely acceptable as long as the projections lead to a reasonable estimate of damages caused by the alleged violations." *Id.* at 1353. *See also Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 863-64 (N.D.Cal. 1979); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F.Supp. 410, 424 (N.D.Cal. 1978).

May 1974, that Independence would have sold its goods at premium prices, and that Independence could have obtained adequate financing to operate at capacity in 1973 and 1974. It is irrelevant to the question of the admissibility of Dr. Madansky's testimony that the evidence underlying these assumptions was vigorously disputed. *See Terrell* v. *Household Goods Carriers Bureau*, 494 F.2d 16, 24 (5th Cir. 1974), *cert. denied*, 419 U.S. 987 (1974). The extent to which the evidence supporting these assumptions was creditable is a matter for the defendants to argue and the jury to consider in judging the weight to be given to Dr. Madansky's testimony. *See id.* at 24; *Lehrman* v. *Gulf Oil Corp.*, 1974-2 Trade Cases ¶75,236 (5th Cir. 1974).[7] In summary, there was no error in admitting Dr. Madansky's testimony.

Damages Traceable to "Antitrust Injury"

Copperweld and Regal argue that the Court erred in refusing to instruct the jury that recoverable damages are limited to those directly traceable to "antitrust injury." The defendants are correct that the plaintiff can recover only those damages that are traceable to their anticompetitive conduct. *See, e.g., Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133, 1136 (5th Cir. 1979), *reversed and remanded on other grounds*, U.S. (May 18, 1981). In the cases on which the defendants rely, the plaintiffs were not kept out of the market entirely by the defendants' unlawful conduct but their business suffered substantial losses during the period the conspiracy existed. The courts held in those cases that the plaintiffs might not recover *all* of the losses they suffered during the conspiracy, since some of those losses might be due to lawful competition or other factors and not to the defendants' unlawful activities. But, the plaintiffs could recover that portion of their losses attributable to the conspiracy. *See, e.g., Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d

[7] Moreover, it should be noted that the defendants were somewhat successful in attacking Dr. Madansky's conclusions, since the jury's award of damages was substantially less than the damages that Dr. Madansky calculated.

1338, 1353 (3d Cir. 1979); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 864 (N.D.Cal. 1979). Unlike *Coleman* and *Murphy Tugboat*, however, there is no question here that the losses Independence suffered are directly traceable to the defendants' unlawful conduct, since the defendants succeeded in excluding Independence from the market entirely; all the losses Independence suffered are attributable to the defendants' conduct because Independence did not have the opportunity to suffer losses at the hands of lawful competition. Consequently, there is no basis for Copperweld and Regal's claim that the jury was improperly instructed with respect to "antitrust injury."

The Certainty with which Damages Are Proved

Copperweld and Regal charge that the Court erred in failing to instruct the jury on the degree of certainty to which the damages must be proved. They object to the following instruction:

> Now, while Independence has a burden by a preponderance of the evidence, it does not have to establish the exact or the precise dollars and cents amount of its damages. We are, as you know, dealing with estimates and projections of sales, of costs, of profits, and it is not possible, accordingly, and Independence does not have to, prove the exact amount, or even a substantially exact amount, of the damages, or to establish them with mathematical accuracy.
>
> • • • • •
>
> As I have already stated, you are not to award damages which are pure speculation, guesswork or conjecture. But you may consider estimates and reasonable approximations to the extent necessary to determine Independence's damages as long as there is a sufficient basis in the evidence from which your estimate can reasonably be inferred.

Tr. 10660-10664.

This instruction, say the defendants, is a virtual direction to the jury to estimate damages and to ignore the rule of law that damages must be established with reasonable certainty by a preponderance of the evidence.

The defendants' argument is incorrect. It is well established that, insofar as antitrust damages are concerned, the plaintiff must establish the reasonable probability of some connection between the defendants' unlawful conduct and some loss to the plaintiff; if the plaintiff succeeds in establishing this connection, however, the jury is entitled to make a "just and reasonable estimate of the [amount of] damage." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F.Supp. 410, 424 (N.D.Cal. 1978). *See also Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2nd 575, 580 (5th Cir. 1980). Furthermore, we specifically instructed the jury that Independence had the burden of proving its damages by the preponderance of the evidence. Consequently, the instructions on computation of damages were not improper in any respect.

Treble Damages

Copperweld and Regal next argue that the jury should have been instructed that the Court would treble its verdict on damages. According to the defendants, publicity regarding antitrust cases in recent years has created a risk that, without a cautionary instruction, jurors will treble their damage calculation.

It is within the discretion of the trial court, however, to give or not to give an instruction concerning treble damages. Additionally, many courts believe that instructing the jury about treble damages is inadvisable, since it may induce the jury to lower its verdict. *See, e.g., Noble* v. *McClatchy Newspapers*, 533 F.2d 1081, 1090-91 (9th Cir. 1975), *cert. denied*, 433 U.S. 908 (1977) (error for trial court to instruct the jury that their damage award would be trebled). More importantly, the defendants in this case clearly were not prejudiced by the Court's refusal to instruct the jury regarding treble damages.

As the Court informed the parties, the foreman of the jury in response to an inquiry from the Court, prompted by the fact that the judgment was mathematically divisible by three, advised that the jury determined single damages by reference to Independence's actual operating results and did not treble their damage calculation.

Lost Profits as an Element of Damages

Copperweld and Regal contend that they are entitled to judgment n.o.v. on the ground, first, that lost profits of a new business enterprise, like Independence, are too speculative to be allowed as a recoverable item of damage under the antitrust laws and under Illinois law.

As for the antitrust law, innumerable cases have held that a business excluded from the market as a result of other businesses' unlawful conduct can recover lost profits for the period it was excluded. *See, e.g., Midessa Television Co.* v. *Midessa Telecasting Co.*, 617 F.2d 1141, 1144 n.6 (5th Cir. 1980), *cert. denied*, U.S. (1981); *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97, 106 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). There is no reason why a new business which is excluded from the market for a period of time should not recover reasonably probable lost profits. In most if not all antitrust cases, the precise amount of damages is difficult to calculate. In antitrust cases, the risk of uncertainty in the calculation of damages lies with the wrongdoer. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Where a new business, rather than an established business is injured, the damages may be more difficult to ascertain with precision. It is inconceivable, however, that simply because the calculation may be less precise, the wrongdoer should be relieved of liability. A new business like Independence can recover lost profits as damages provided that, as in this case, there is a reasonable basis for establishing the amount of its damages.

Moreover, the cases that Copperweld and Regal cite in support of their proposition that lost profits are not recover-

able in antitrust cases are inapposite. Most of the cases are not antitrust cases. *See McBrayer* v. *Teckla, Inc.,* 496 F.2d 122 (5th Cir. 1974) (diversity case); *Putnam* v. *Lower,* 236 F.2d 561 (9th Cir. 1956) (admiralty case); *Sambo's of Ohio, Inc.* v. *City Council of City of Toledo,* 466 F.Supp. 177 (N.D.Ohio 1979) (civil rights case in which the plaintiff sought injunctive relief rather than damages). And, the reference to new businesses' damages in the remaining case is unsupported dictum. *See Roseland* v. *Phister Mfg. Co.,* 125 F.2d 417 (7th Cir. 1942).

As for Illinois law, the cases that Copperweld and Regal cite in support of their claim that lost profits are not recoverable are equally unconvincing. The reference to such a rule in one of the cases is dictum, *see Rhodes* v. *Sigler,* 44 Ill.App. 3d 375, 357 N.E. 2d 846 (3d Dist. 1976); in the other case, the court reversed the damages award because of the absence of evidence supporting it. *See Tonchen* v. *All-Steel Equipment, Inc.,* 13 Ill.App.3d 454, 300 N.E.2d 616 (2d Dist. 1973).

Support for the Damage Award

Copperweld and Regal further contend that they are entitled to judgment n.o.v. on the ground that there is no basis in the record for the jury's award of damages if Dr. Madansky's tesitmony were excluded, as they believe it should be. But, since, as discussed previously, it was not error to admit Dr. Madansky's testimony this contention fails as well.

THE COUNTERCLAIM

The defendants asserted in their counterclaim that Independence engaged in a systematic plan to induce Regal employees to leave Regal's employment for Independence in order to obtain trade secrets and confidential information from Regal and to interfere with Regal's operations. At the conclusion of the trial, the Court directed a verdict in favor of Independence. The defendants now argue that the Court erred in excluding the testimony of three Regal employees and in excluding evidence that Mr. Grohne took confidential

and financial information when he left Regal. They also argue that, even without this testimony, there was sufficient evidence of malicious interference with a business relationship to let the claim go to the jury.

Excluded Testimony

Copperweld and Regal argue that the Court improperly excluded the testimony of Ms. Ratkovich and Mr. Larsen, two Regal employees who allegedly were invited by Mr. Grohne to leave Regal for Independence but resisted the temptation. Their testimony, according to the defendants, was probative of Mr. Grohne's systematic attempts to "raid" Regal.

We found, however, that Ms. Ratkovich's and Mr. Larsen's testimony was not relevant to the defendants' claim. Ms. Ratkovich testified before the jury about a conversation she had with Mr. Grohne in 1976. During this conversation, by Ms. Ratkovich's admission, Mr. Grohne never offered her a job, never mentioned Independence, never asked her if she wanted to work for Independence, and never told her that there would be a position for her with Independence. Ms. Ratkovich attempted to testify to her "understanding" that Mr. Grohne's call to her was an invitation to join Independence but this testimony was excluded for obvious reasons and thereafter her previous testimony was properly stricken as irrelevant. Mr. Larsen testified, in a deposition which was not read to the jury, that Mr. Grohne asked him whether he would consider working for Independence. Mr. Larsen was not offered any inducement to leave Regal. Moreover, he was not, strictly speaking, an employee of Regal but an independent sales agent at the time of his conversation with Mr. Grohne. Thus, Mr. Larsen's testimony was also properly excluded as irrelevant.

The defendants also object to the exclusion of Mr. Campion's testimony. Mr. Campion, the Chairman and President of Lear Siegler, would have testified concerning Mr. Grohne's intent at the time he left Regal and Lear Siegler.

This testimony is crucial, according to the defendants, because it contradicts Mr. Grohne's "self-serving" statements regarding his reasons for leaving his former employer. Mr. Grohne's intentions upon leaving Regal and Lear Siegler in mid-1972 are at best only marginally relevant to his intentions in 1973 and 1974. Moreover, Mr. Campion was not competent to testify to Mr. Grohne's intentions. Nor did Mr. Grohne owe any duty either to Lear Siegler or Copperweld to disclose what his intentions were with respect to his employment after the acquisition of Regal by Copperweld. Exclusion of his testimony, therefore, was not error.

Finally, the defendants object to the exclusion of testimony to the effect that Mr. Grohne took confidential business information and trade secrets when he left Regal and that his purpose in inducing Regal employees to work for him was to obtain additional information of this sort. The defendants failed to establish, however, that the information Mr. Grohne allegedly obtained contained any trade secrets or business data which was treated confidentially. In fact, testimony presented at trial suggested that the opposite was true. They also failed to establish that Mr. Grohne employed any of this information at Independence. In the absence of any evidence that the information was confidential or that it was ever used, testimony that Mr. Grohne took it was irrelevant. *Cf. Ancraft Products Co.* v. *Universal Oil Products Co.*, 84 Ill.App.3d 836, 843, 405 N.E.2d 1162, 1167-68 (1st Dist. 1980). The testimony was, therefore, properly excluded.

Sufficiency of the Evidence

Even without the excluded evidence discussed above, the defendants assert that there was sufficient evidence that Mr. Grohne maliciously induced Regal employees to terminate their employment to send the issue to the jury. They object, therefore, to the Court's directing a verdict in the plaintiff's favor.

To establish a prima facie case of tortious interference with an employment relationship the defendants must estab-

lish the existence of a valid employment relationship, knowledge on the part of Mr. Grohne, the interfering party, of this relationship, "intentional and malicious interference inducing or causing a breach or termination of the relationship," and damage. *See Ancraft Co.* v. *Universal Oil Products Co.*, 84 Ill.App.3d 836, 844, 405 N.E.2d 1162, 1168 (1st Dist. 1980). Copperweld and Regal failed, however, to produce evidence of at least two of these elements: that Mr. Grohne's interference was malicious or that Regal was damaged.[8]

As proof of malicious interference, the defendants rely heavily on Mr. Grohne's invitations to several Regal employees to leave Regal and join Independence. Copperweld and Regal produced evidence suggesting that Mr. Grohne approached Mr. Uzarowicz while the latter was working for Green Bay Tube and offered him a job at Independence. There is also evidence that Mr. Janonis, shortly before he left Regal for Independence, was told by an Independence employee that an advertisement for a job in which Mr. Janonis might be interested would be appearing shortly in the newspaper. With regard to Mr. Kwarta and Mr. Bauer, the evidence, even when viewed in the light most favorable to the defendants, indicates simply that they applied to Independence for a job and that Mr. Grohne hired them; there is no evidence that either Mr. Kwarta or Mr. Bauer were solicited by Mr. Grohne or any other Independence employee.

In *Ancraft Co.* v. *Universal Oil Products Co., Supra,* similar invitations were held not to constitute tortious interference. In that case, the defendant had asked one of the plaintiff's

[8] With respect to Mr. Uzarowicz, there is also no evidence of an employment relationship between Mr. Uzarowicz and either Regal or Copperweld at the time Mr. Grohne allegedly induced him to join Independence. Mr. Uzarowicz was employed by Green Bay Tube between the time he left Regal and the time he joined Independence. There is also no evidence of damage to Regal or Copperweld as a result of Independence's employing several of their employees.

employees if he had "given any thought to leaving" his present employer and coming to work for the defendant. The court held that a conversation of this sort, alone, could not be characterized as inducement, much less tortious inducement. *Id.* at 845, 405 N.E.2d at 1169. Similarly, in *TAD, Inc.* v. *Siebert,* 63 Ill.App.3d 1001, 380 N.E.2d 963 (1st Dist. 1978), the defendants, who had once worked for the plaintiff, contacted eighteen of the plaintiff's employees, offered them jobs, offered them better salaries, and attempted to persuade them to join the defendants' new firm. The court in that case held that the defendants' actions did not constitute tortious interference, as it explained:

> [T]here is no evidence of any malicious conduct on the part of defendants who, . . . offered higher salaries to a number of personnel under contract to plaintiff. It is not apparent that defendants made any false representations, threats, or engaged in any surreptitious conduct which induced any personnel to terminate their employment contracts with the plaintiff.

Id. at 1006-07, 380 N.E.2d at 967.

When the evidence with regard to Messrs. Uzarowicz, Janonis, Kwarta and Bauer is compared with that in *Ancraft* and *TAD, Inc.*, it is apparent that there is no evidence in this case of malicious interference with an existing employment relationship. There is no evidence that Mr. Grohne made any false representations to these employees, threatened them in any fashion, or engaged in any surreptitious conduct.

The defendants' alternative theories of malicious inducement are equally unconvincing. First, they claim that malicious inducement exists here because Mr. Grohne's inducement of several employees to work for him had the "Indirect purpose of injuring [Copperweld and Regal] or benefitting [Independence] at [their] expense." Even if this theory is an accurate statement of the law—and it clearly is not in light of *Ancraft* and *TAD, Inc.*—there is no evidence

that Copperweld and Regal were injured or that this was Mr. Grohne's purpose in hiring the former Regal employees. Second, the defendants claim that malicious inducement exists because Mr. Grohne's purpose in wooing their employees was to obtain confidential business information. Again, however, there is no support in the record of this contention.

In the absence of evidence supporting the defendants' claim of malicious inducement, there was no error in directing a verdict in Mr. Grohne's favor on the counterclaim.

PREJUDICIAL COMMENTS

Copperweld and Regal argue that they are entitled to a new trial on the ground that the Court's conduct throughout the trial was extremely prejudicial to the defendants and prevented the jury from reaching a fair and impartial verdict. According to the defendants, the Court repeatedly served as advocate for the plaintiff's cause, made numerous inconsistent evidentiary rulings which invariably favored the plaintiff, and questioned witnesses excessively. As mentioned earlier, the defendants have pointed to approximately 100 rulings and 300 questions or comments which allegedly evidence the Court's bias. They cite our questioning of Mr. Seamans and Mr. Wilson, our comments regarding Mr. Coughlin's attempts to impeach Mr. Norris and Mr. Bruggeman, and our allegedly aiding Mr. Grimm in cross-examining Mr. Breedlove as particularly egregious examples.

It would be pointless to discuss each allegedly prejudicial comment or question in this opinion, since a new trial should be granted not on the basis of isolated remarks but only if the record as a whole reveals a miscarriage of justice. *See Marcoux* v. *Mid-States Livestock, Inc.*, 429 F.Supp. 155, 165 (N.D.Ia. 1977), *aff'd*, 572 F.2d 651 (8th Cir. 1978). As Independence points out, the defendants' citation of the Court's remarks is highly selective and many of the remarks are cited out of context in a manner that makes them appear

prejudicial when they were not. The defendants also overlooked the numerous questions, comments and rulings by the Court that turned out to disfavor Independence, thus creating the illusion that we questioned only the defendants' witnesses and ruled only against the defendants on evidentiary questions. When the entire record is considered, we believe it is clear that we did not favor either side during the trial.

Finally, the defendants overlook that the Court gave a cautionary instruction to the jury at the close of the case, admonishing them not to "attempt to draw any conclusions about my opinions of this case from the questions which I asked." Tr. 8450.

In light of all of the foregoing, we conclude that the defendants' motions must be denied. An appropriate order will enter.

United States District Judge

Dated: June 22, 1981

APPENDIX C

APPENDIX C

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION,** a Pennsylvania corporation, and **REGAL TUBE COMPANY,** a Pennsylvania corporation, *Defendants.*	No. 76 C 4201 — The Honorable Hubert L. Will Presiding Judge

MEMORANDUM OPINION

"For the reasons stated above, the plaintiff is awarded attorneys' fees of $1,722,175.53 plus interest from the date hereof; the order of June 22, 1981 is vacated; and costs of $92,497.17 plus interest from the date hereof are taxed against the defendants. DRAFT. (SEE DRAFT FOR FULL PARTICULARS.)

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, *Plaintiff,* vs. **COPPERWELD CORPORATION and REGAL TUBE COMPANY,** *Defendants.*	**No. 76 C 4201**

REVISED MEMORANDUM OPINION

After a ten-week, bifurcated trial, a judgment for $7,497,027.00 was entered against the defendants on the plaintiff's antitrust claim, trebling the jury's verdict of $2,499,099.00.[1] On June 22, 1981, we denied the defendants' motion for judgment notwithstanding the verdict or for a new trial.

The plaintiff has filed a petition for attorneys' fees under section 4 of the Clayton Antitrust Act. 15 U.S.C. § 15. The total requested is $1,668,202.25. That amount includes $1,337,402.25 for 17,781.25 hours spent by the plaintiffs' attorneys, both partners and associates; $55,473.75 for 1,749.75 hours spent by law students; $243,564.05 for 8,074.50 hours

[1] A judgment of $15,000.00 was also entered against defendant Regal only for commercial defamation and tortious interference with the plaintiff's relationship with Deere. After the liability trial in which the jury found defendant Yoder Co. guilty of breach of contract, the plaintiff settled with Yoder which is, therefore, no longer a party to this suit.

spent by legal assistants; and $31,762.50 in fees of attorneys, students, and assistants for time spent preparing and litigating the petition for fees and the bill of costs. The plaintiff has also requested an upward adjustment of the award based on the nature of the litigation and the attorneys' skill as well as interest on the award. For the reasons hereinafter stated, the plaintiff is awarded attorneys' fees of $1,722,175.53 plus interest.[2]

The plaintiff has also filed a bill of costs, requesting $151,892.23. After the defendants filed objections, in accordance with the procedures in this district, our deputy clerk awarded the plaintiff costs of $129,610.10, the total of the amounts requested for deposition transcripts; witness fees and travel expenses; the plaintiff's expert witness fees and expenses; photocopying, charts, and photographs; and docket fees. The clerk disallowed the costs of the transcripts of court proceedings, the defendants' expert witness fees and expenses, and computerized research costs. The parties filed cross motions for review of the clerk's assessment. We held a hearing on October 15, 1981, to discuss with the parties the deficiencies both in the plaintiff's supporting documentation and in the defendants' objections which made it impossible to evaluate which costs should be taxed and which disallowed. At that time, we ordered the plaintiff to submit supplemental material in support of its bill of costs. The plaintiff filed an amended request for $92,791.55, and the defendants then filed further objections. For the reasons hereinafter stated, the clerk's order of June 22, 1981, is vacated, and the plaintiff is awarded costs of $92,497.17, plus interest.

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[2] In their first set of objections, the defendants requested a hearing. On October 15, 1981, we held a status hearing which, although not a formal hearing, provided an opportunity for discussion of the issues raised in the petition. A more extensive hearing is not necessary in this case since a hearing is not an efficient manner to accomplish the minute analysis of time spent which the defendants argue is required.

I. Attorneys' Fees

The accepted method for determining the amount of an award of attorneys' fees begins with the calculation of a so-called lodestar figure by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. That figure is then adjusted up or down depending on the quality of representation and, if a contingency representation, on the risk that the lawsuit might have been unsuccessful and no fee obtained. That method is the simplest and most precise way of considering the twelve generally accepted factors on which a fee award should be based: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment; the customary fee in the community for similar work; the fixed or contingent nature of the fee; time limitations imposed by the client or the circumstances; the amount involved and the result obtained; the experience, reputation, and ability of the attorneys; the desirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases. *See generally, Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245 (N.D.Ill. 1979); American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.

A. The Time-Rate Analysis

1. Hourly rates

The rates requested for the partners who worked for the plaintiff on this case range from $85 for the lowest rate for partners in 1976 to $140.00 for the highest rate for partners in 1981. The rates for associates range from $50.00 for the lowest rate in 1976 to $80.00 for the highest rate in 1981.

We find that the hourly rates requested for the plaintiff's attorneys is reasonable in light of the rates customarily charged in the locality and the experience, reputation, and ability of the plaintiff's lawyers. *Cf. In re Folding Carton*

Antitrust Litigation, 84 F.R.D. 245, 265 (N.D.Ill. 1979) ($150.00 maximum hourly rate for attorneys on the plaintiff class executive committee or senior attorneys who made particularly significant contributions to the litigation; $125.00 for committee chairmen and other middle and senior partners who made significant contributions; $75.00 for associates). The rates of the plaintiff's attorneys are comparable to those charged by the defendants' Chicago firm which range from $70.00 in 1976 to $143.00 in 1981 for partners and from $42.00 in 1976 to $98.00 in 1981 for associates.

2. Hours spent

(a)

The defendants contend that an unspecified amount of the time included in the plaintiff's petition cannot be awarded because it represents duplicative work by the plaintiff's attorneys, *e.g.*, attendance by more than one attorney at depositions, motion and status calls, and court hearings. Duplication should not be paid for by the losing party but an item-by-item accounting in a case of any size is unreasonably burdensome. Other courts "have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Northcross* v. *Board of Education*, 611 F.2d 624, 636-37 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). *See also Copeland* v. *Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc). *Cf. Prandini* v. *National Tea Co.*, 585 F.2d 47, 51 (3d Cir. 1978) (court held that, "[a]bsent evidence to support the district court's finding of duplication or overlap, we cannot sustain the 10% fee reduction imposed by the district court.")

From our observation of this case, we conclude that there was some unnecessary and, therefore, noncompensable duplication. On many occasions, two and even three counsel participated in proceedings which could have been handled by one. On the other hand, the magnitude of the case clearly required the services of a number of attorneys as evidenced

by the teams of counsel employed by the defendants. In determining the award, we will reduce the total number of attorney hours requested by ten percent.

(b)

Although at one time the Seventh Circuit held that all time spent on a case is compensable even time spent on claims which the party seeking attorneys' fees lost, *see Sherkow* v. *Wisconsin*, 630 F.2d 498, 504-05 (7th Cir. 1980); *see also Northcross* v. *Board of Education*, 611 F.2d at 636, in its most recent opinions on this subject, the court of appeals has held that attorneys' fees can be awarded only for preparation and presentation of claims on which a party is successful. *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 80-2851 (7th Cir. Nov. 24, 1981); *Busche* v. *Burke*, 649 F.2d 509, 522 (7th Cir. 1981). *See also Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980). Although these cases involved the Civil Rights Attorneys' Fees Act rather than the Clayton Act, there is no reason to interpret section 4 of the Clayton Act, which awards attorneys' fees to a plaintiff who establishes that he was "injured in his business or property," differently from section 1988 of the Civil Rights Act, which awards attorneys' fees to the "prevailing party." *Compare Busche* v. *Burke*, 649 F.2d at 522 (section 1988) *with Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1214 (3d Cir. 1978) (Clayton Act case in which fees were not awarded for hours spent on unsuccessful claims).

Moreover, although the Seventh Circuit has apparently never decided this issue, since it has held that time spent on unsuccessful claims should be distinguished from time spent on successful claims, it probably would also hold that fees should not be awarded for time spent on state law claims, even if those claims were successful, since there is no statutory authority for such an award. *See Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d at 1215-16.

However, although

> no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail . . . . [i]t sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the "issue was all part and parcel of one matter," *Lamphere* v. *Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979), but only when the claims asserted are "truly fractionable," *id.*

Copeland v. *Marshall*, 641 F.2d at 891-92 and n.18. Similarly, the calculation of time spent on successful claims "presumably includes time spent on unsuccessful claims to the extent such time would have been spent in connection with the successful claims even if the unsuccessful claims had not been brought." 649 F.2d at 522.

Furthermore, time spent on an issue on which a party failed to prevail but which was an aspect of a larger, successful claim, so that the failure affected only the amount of damages due for the claim on which he did succeed but did not affect the finding of liability, is compensable. *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 81-2851, p. 30 (7th Cir. Nov. 24, 1981). In *Syvock*, the plaintiff had succeeded in his claim that the defendant had discriminated against him on the basis of age but failed to prove that he had mitigated his damages or that the defendant had acted willfully. The court held that all time spent on the age discrimination claim was compensable including time spent on the issues of mitigation and willfulness.

(c)

In count III of the complaint in this case, the plaintiff alleged that defendant Yoder Co. had breached a contract with the plaintiff to provide a mill, equipment, and tooling

which the plaintiff would have used to manufacture structural steel tubing. The jury found for the plaintiff on the breach of contract claim. In count IV of the complaint, the plaintiff alleged that defendants Copperweld and Regal had tortiously interfered with the contract between Yoder and the plaintiff. The jury found against these defendants and for the plaintiff on the tortious interference claim. In count I of the complaint, the plaintiff alleged that Yoder's breach of the contract was part of a conspiracy between Yoder, Copperweld and Regal to prevent the plaintiff from entering the structural steel tubing market in violation of section 1 of the Sherman Act. The jury found against Copperweld and Regal on that issue but found that Yoder was not a part of the conspiracy. In support of its section 1 claim, the plaintiff attempted at trial to introduce evidence of functional discounts granted by the defendants to Ryerson. We excluded that evidence. The plaintiff also attempted to show that Copperweld and Regal had conspired in violation of the antitrust laws to interfere with the plaintiff's relationship with Deere Plow and Planter Works. The jury found that there was no conspiracy to interfere with the plaintiff's business relationship with Deere but that Regal alone did interfere with that relationship. Count V of the complaint alleged that the defendants libelled and slandered the plaintiff. The jury found that Regal, but not Copperweld, was liable for commercial defamation. Count II of the complaint stated a claim for monopolization, a violation of section II of the Sherman Act. That count was voluntarily dismissed before trial.

The defendants brought a counterclaim against the plaintiff and its president David Grohne. The counterclaim alleged that the plaintiff had engaged in a systematic plan to induce Regal employees to leave Regal's employment for the plaintiff's in order to obtain trade secrets and confidential information from Regal and to interfere with Regal's operations. At the conclusion of the trial, we directed a verdict on the counterclaim in favor of the plaintiff.

In their objections to the plaintiff's petition for attorneys' fees, the defendants argue that the plaintiff cannot receive attorneys' fees for time spent on state law claims—the plaintiff's defense of the counterclaim, the breach of contract claim, the claims involving Deere, and the tortious interference claim—and that the plaintiff cannot receive attorneys' fees for time spent on the unsuccessful antitrust claims—the claims of conspiracy relating to Deere and Ryerson, the monopolization claim, and the claim of a conspiracy with Yoder. We agree that time spent on those claims is not compensable unless the claims are not "truly fractionable" from the successful antitrust claim. *Lamphere* v. *Brown University*, 610 F.2d 46, at 47 (1st Cir. 1979).

(d)

Under the applicable legal standards, we conclude that the plaintiff is entitled to attorneys' fees for services performed in relation to the counterclaim, the contract claim, the tortious interference claim, the Yoder conspiracy claim, and the monopolization claim because time spent on those claims would have been spent in connection with the successful section 1 claim even if the other claims had not been brought. The defendants' counterclaim against Grohne and the plaintiff was identical to their defense against the plaintiff's section 1 claim: the defendants argued that Grohne's alleged use of trade secrets and inducement of employees both made him liable to the defendants under state law and justified their activities which the plaintiff was claiming violated section 1, thus relieving them from liability under the antitrust laws. Even if the plaintiff had not had to defend the counterclaim, the plaintiff's attorneys would have had to perform the same services to counter the defendants' defense to the section 1 claim. Therefore, time spent on the counterclaim is also compensable.

The defendants argue that the breach of contract claim is separate from the antitrust claim because Coppe:weld and Regal did not defend the antitrust claim on the theory that there was no contract between Yoder and Independence.

This is not totally accurate since they did contend that certain conditions precedent to a contract had not been met. In any event, much of the dispute in the breach of contract suit involved the reason Yoder did not deliver the mill, whether it was a result of pressure by Copperweld and Regal or whether it was due to other factors which had no antitrust implications. Those issues are indistinguishable from the issues in the antitrust claim. Although the plaintiff may not have had to prove the existence of a contract if the breach of contract claim had not been brought, since most of the time spent on the contract claim was directly relevant to the antitrust claim, and since the parsing of compensable from noncompensable time would be an impossible task, fees for most of the time spent on the contract claim will be awarded. The only exceptions are the 60.5 hours spent on the jury instructions relating to the breach of contract claim and the 71.75 hours spent on the Yoder settlement since those relate solely to the contract claim against Yoder.

Similarly, time spent attempting to prove that Yoder was part of the conspiracy will not be excluded from the fee award. All the issues which are a part of that claim—*e.g.*, the contacts between the various defendants, the timing of and the relationship between the various events leading to Yoder's breach of the contract—were as much a part of the antitrust case against Copperweld and Regal as they were part of the case against Yoder.

Although the defendants argue that "significant efforts involved in research, briefing, discovery and trial time" related solely to the tortious interference with the Yoder contract claim, they have not identified how many hours they contend were spent solely on that claim nor given any examples of activity which would not have been performed by the plaintiff's attorneys if only the antitrust claim and not the state law claim had been brought. To prove its antitrust claim, the plaintiff proved, among other things, a tortious interference with the Yoder contract and then

proved a conspiracy. The tortious interference claim, therefore, is "part and parcel" of the antitrust claim, and time spent thereon will be included in the fee award.

Time spent on the plaintiff's withdrawn monopolization claim is also compensable. One of the defendants' defenses to the section 1 claim was that, since they did not have a near-dominant share of the market, even if they had used unfair means to keep the plaintiff out of the market, they did not create the risk of a monopoly and, therefore, there was no unreasonable restraint of trade. Although we rejected that theory at trial, until that time, the plaintiff could not be certain that we would exclude the defendants' evidence of market share and had to be ready to counter that defense by proving the defendants had a large market share. Since that could only be established by doing the same discovery and preparation that would be done to prove a monopolization claim, time spent on the withdrawn monopoly claim is compensable.

The defendants argue that time spent on what they characterize as "market issues for 1975 and 1976" should not be awarded. The plaintiff introduced evidence on the condition of the structural steel tubing market to show restraint of trade. The defendants retort several times that the evidence was rejected by the jury because the jury "specifically found" that the conspiracy ended by 1975. That statement is incorrect. None of the interrogatories answered by the jury contained any dates or asked the jury to find when the conspiracy ended, although the jury did find that certain acts after 1975 were undertaken by Regal alone. Even if the jury had made such a finding, however, the evidence of market structure in 1975 and 1976 was part of the plaintiff's proof of its claim of an antitrust violation in 1974. The restraint of trade and the damages suffered by the plaintiff did not necessarily end when the plaintiff entered the market in 1974 since the delay in its entry had repercussions well after the time it began operation. The size of the jury's verdict clearly implies that it found the effects of the defendants' illegal

activity went beyond the nine months in which the plaintiff was excluded from the market.

Time spent on the Deere claim and the Ryerson issue, however, is not compensable. In *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 80-2851 (7th Cir. Nov. 24, 1981), the court distinguished between cases in which a party loses only an aspect of a claim so that all time spent on a claim is compensable, and cases in which a party contends that several different actions of the defendants violated the law and in which the party fails to prove that all of the actions were illegal so that only time spent on the successful portions of the case is included in the fee award. Slip op. at 30. Although the plaintiff argues that its allegations relating to Deere and Ryerson were only aspects of its claim that the defendants violated section 1 by conspiring to keep the plaintiff out of the market, the case does not arise, as the plaintiff argues, from one set of facts, and the claims relating to Deere and Ryerson are not simply different theories of recovery based on the same facts as the successful antitrust claim which related to the tortious interference with the Yoder contract. Although all were contained within count I of the complaint, the plaintiff's theory was that any one of the acts of the defendants violated the antitrust laws. Since the plaintiff failed to prove that the defendants' acts with respect to Ryerson were a restraint of trade or that defendant Regal's acts with respect to Deere were done in conspiracy with Copperweld, time spent on those aspects of the case cannot be included in the antitrust fee award. The plaintiff identifies 176.25 attorney hours and 105 legal assistant hours spent on those claims.

The defendants make several miscellaneous objections. They object to including time spent on two motions which were never filed. Although these motions apparently related to issues in the case with respect to which the plaintiff can recover attorneys' fees, the time is not compensable since the motions were never filed. On the other hand, the plaintiff's

research involving the motion to disqualify one of its attorneys is related to the suit as a whole and therefore to the successful antitrust claim, and the plaintiff can receive attorneys' fees for that time. Accordingly, 10.50 hours spent on the unfiled motions will be eliminated. The defendants have noted that 1.25 hours included in the petition were spent at a court appearance in another, unrelated case. That time will also not be included in the award.

The defendants object to any fee award for time spent on the plaintiff's damages claim. Their argument that this work is not legal work, however, is frivolous. Although economic calculations are not legal work, the plaintiff's attorneys apparently left that to their experts and spent the time included in the fee petition gathering information to submit to the expert for analysis and preparing the experts' conclusions for presentation to the jury. Those tasks are clearly part of a lawyer's responsibility.

The defendants also argue that time spent on damages should not be awarded because the plaintiff sought total single damages of $8,298,240.00 but received single damages of only $2,499,009.00. That discrepancy might justify reducing the number of hours awarded but it could not justify eliminating that time from the award altogether; the time was productive in part in that the jury did award substantial damages. Furthermore, the time is compensable under the rule announced by the Seventh Circuit in *Synock* v. *Milwaukee Boiler Mfg. Co.*, 80-2851 (7th Cir. 1981), in that whatever part of the plaintiff's damages claim the jury rejected was an aspect of the larger, successful damages claim and the rejection only affected the amount of damages not the finding that the defendants were liable or that the plaintiff had suffered some damages. It is inevitable that a plaintiff will endeavor to prove the largest possible damages. The amount of time to which the defendants object (2038.75 hours) is not unreasonably large in light of the complexity of proving what damages were caused by the plaintiff's exclusion from the market and will be included in the fee award. Since that

amount does include some unsuccessful effort, however, it will be excluded from the amount to which a multiplier is applied. *See* discussion, *infra*.

The defendants also object to time spent in depositions on noncompensable subjects. Since we have rejected most of their objections regarding which subjects are noncompensable, we will not subtract any additional time for depositions.

Finally, the defendants object to thousands of hours which they claim are not explained in a way which indicates sufficiently the nature of the task on which the time was spent. The defendants, however, do not identify which hours they object to on that ground. Without more specific objections, the plaintiff cannot supply more documentation, and we cannot determine the validity of the argument. We believe it reasonable to place the onus of an item-by-item examination of the plaintiff's time records on the defendants not the court, with the court purusing the records identified in the defendants' objections. In this case, since the defendants have not provided us with sufficient evidence of their objections, we will not subtract any time for entries which the defendants allege they cannot decipher.

B. Adjustment

Whether an award of attorneys' fees should be in an amount above—or below—the lodestar depends on the contingent nature of compensation in the particular case, the complexity of the issues and the quality of the attorneys' representation. *Lindy Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). The factors considered in evaluating the contingent nature of success are the plaintiff's burden, the risk assumed in developing the case, and the delay in receipt of payment. *Id.*[1] An adjustment due to the quality of representation

[1] In connection with the plaintiff's request for an additional amount above the lodestar, the defendants requested a copy of any fee arrangements between the plaintiff and its attorneys prior to

(footnote continued on next page)

must be made on the basis of a finding that the attorneys' performances were not just good or competent but exceptional and evidenced an unusual degree of skill. *Id.* The quality determination involves a comparison of the potential recovery to the actual recovery and an evaluation of the attorneys' methods of efficient or obstruction tactics. *Id.*

We will apply a multiplier of 1.2 to a portion of the plaintiff's attorneys' fees. The plaintiff's attorneys showed considerable skill in handling this case. The case was complex, and the defendants complicated it by raising a wide variety of issues and a number of novel theories, all of which the plaintiff successfully refuted. We note particularly the defendants' invocation of the so-called "Noerr-Pennington" doctrine to argue that some of their activities were related to their preparation of a possible lawsuit and were therefore protected by the first amendment.[4]

C. Fee Petition and Bill of Costs

The defendants object to that amount of the fee petition which represents time spent preparing the plaintiff's petition for fees and bill of costs and the various memoranda the plaintiff has filed in support of the petition and bill of costs. Fees for services performed in connection with the fee appli-

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(footnote continued from preceding page)

the agreement presently in effect and already produced by the plaintiff. The plaintiff objected to that request and submitted the document for our *in camera* inspection. After examining the documents, we find that it is irrelevant and need not be produced.

[4]The plaintiff requested a multiplier in part due to the protracted nature of the litigation caused by the obstructionist tactics of the defendants. That factor, however, is already reflected in the number of hours billed and awarded. Time spent overcoming, *e.g.*, the defendants' discovery obstacles involved routine legal services which required no exceptional skill and cannot justify a multiplier. Our award of a multiplier, therefore, is not based on that ground.

cation are awarded in civil rights suits. *Johnson* v. *State of Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Gagne* v. *Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *Weisenberger* v. *Huecker*, 593 F.2d 49 (6th Cir.), *cert. denied*, 444 U.S. 880 (1979); *Prandini* v. *National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978); *Hairston* v. *R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975). The rationale for such an award is that

> [i]f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, *or other cases for which attorneys' fees are statutorily authorized.* Such a result would not comport with the purpose behind most statutory fee authorizations, *viz*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

Prandini v. *National Tea Co.*, 585 F.2d at 53 [emphasis added]. In *Pitchford Scientific Instruments Corp.* v. *Pepi, Inc.*, 440 F.Supp. 1175, 1179 (W.D.Pa. 1977), *aff'd*, 582 F.2d 1275 (1978), *cert. denied*, 440 U.S. 981 (1979), the court, without discussion, made such an award in an antitrust case.

The cases cited by the defendants in support of their argument that such an award should not be made, *City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Lindy Brothers Builders, Inc.* v. *American Radiator*, 540 F.2d 102, 111 (3d Cir. 1976), are distinguishable. In those cases, the attorneys were entitled to fees not because of a statutory provision but under the equitable fund theory. That theory provides "that an attorney whose actions have conferred a benefit upon a given group or class of litigants may file a claim for reasonable compensation for his efforts." *City of Detroit* v. *Grinnell*, 560 F.2d at 1098. Time spent on efforts to obtain a fee in those cases benefited the attorneys exclusively

and did not increase, protect, or preserve the fund. Under the equitable fund theory, the attorneys were not, therefore, entitled to fees for those efforts. 560 F.2d at 1102; *Lindy Brothers Builders, Inc.* v. *American Radiators*, 540 F.2d at 111. Furthermore, since the attorneys' fees award would have been made in those cases from the settlement fund set up for the class members, awarding fees for time spent in obtaining fees would have depleted the settlement fund. However, "[s]tatutorily authorized fees are not paid out of the plaintiffs' recovery, and the attorney in seeking his fee is not acting in any sense adversely to the plaintiff's interest." *Prandini* v. *National Tea*, 585 F.2d at 53.

Although the rationale which supports the decision to award fees for this time in civil rights cases is not as compelling in antitrust cases, the considerations remain persuasive. It may be less difficult to procure representation in most antitrust cases than it is in civil rights cases, but the provision for attorneys' fees in the Clayton Act reflects a congressional intent to provide the same encouragement to bring suits under the antitrust laws as under the civil rights acts. That similarity supports similar interpretations of the respective attorneys' fees statutes. Furthermore, although the treble damages provision might offset some of the harm caused by allowing these hours to go uncompensated, the deterrent effect of treble damages is diluted if that remedy is used to justify a restricted interpretation of the attorneys' fee provision. A multiplier, *see* discussion, *supra*, however, will not be applied to these hours.

D. Interest on Attorneys' Fees and Costs

The plaintiff has requested interest on attorneys' fees and costs awarded to it. In *Capra, Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978), the court held that interest is not payable on attorneys' fees in antitrust cases because the Clayton Act makes attorneys' fees part of the court costs and interest is not payable on court costs, and because the treble damage award makes interest on attorneys' fees less necessary than in cases where treble damages are not awarded.

567 F.2d 1322. *Cf., Gates* v. *Collier*, 616 F.2d 1268 (5th Cir. 1980) (interest payable on attorneys' fees in civil rights cases). Other courts, however, albeit without discussion, have allowed payment of interest on costs and attorneys' fees in antitrust cases, *Mt. Hood Stages, Inc.* v. *The Greyhound Corp.*, 616 F.2d 394, 406 n.10 (9th Cir. 1980); *City of Detroit* v. *Grinnell Corp.*, 575 F.2d 1009, 1010 (2d Cir. 1979); *Perkins* v. *Standard Oil Co. of California*, 487 F.2d 672 (9th Cir. 1973). Furthermore, unlike the Fifth Circuit, the Seventh Circuit apparently does allow interest on costs. *See Harris* v. *Chicago Great Western Ry.*, 197 F.2d 829, 836 (7th Cir. 1952). Therefore, even if attorneys' fees are considered part of the costs rather than part of the judgment, interest on fees is appropriate. Although the tripling of the damage award may make interest on fees less necessary, the punitive nature of treble damages is undermined when these damages are considered part compensation for delay in payment of attorneys' fees. The defendants must pay interest on the awared of fees and costs from the date it is entered.

E. Conclusion

$1,337,402.25	(request for attorneys' time)
− 19,521.25	(noncompensable time; *see* appendix I)
1,317,881.00	
− 131,788.10	(10% reduction for duplication)
1,186,092.90	
− 143,212.48	(fees for time spent on damages; not
1,042,880.42	subject to multiplier; *see* appendix II)
x 1.2	(multiplier)
1,251,456.50	
+ 143,212.48	(fees for time spent on damages)
1,394,668.98	
+ 55,473.75	(fees for law students)
1,450,142.73	
+ 240,270.30	(fees for legal assistants; *see* appendix
1,690,413.03	III)
+ 31,762.50	(all fees for time spent on petition for
1,722,175.53	attorneys' fees and bill of costs)

II. Bill of Costs

A. Court Reporter—Depositions

Costs may be taxed under section 1920 for "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). If a deposition appeared to be reasonably necessary "in light of the particular situation existing at the time it was taken," *Dorothy K. Winston & Co.* v. *Town Heights Development, Inc.*, 68 F.R.D. 431, 434 (D.D.C. 1975), the cost of a deposition may be taxed even if the witness was not called at trial or the deposition used at trial and even if the deposition was a discovery deposition only. *SCA Services, Inc.* v. *Lucky Stores*, 599 F.2d 178, 180 (7th Cir. 1979); *Fey* v. *Walston & Co.*, 493 F.2d 1036, 1056 (7th Cir. 1974). The cost of a deposition is not taxable, however, if the deposition was not within the proper bounds of discovery or was unduly prolonged. *Federal Savings and Loan Insurance Corp.* v. *Szarabajka*, 330 F.Supp. 1202, 1210 (N.D.Ill. 11971). The losing party's objections to the taxation of depositions or parts of deposition must be specific. *Id.*

Since the plaintiff's original bill of costs and invoices in this case did not contain enough information to evaluate whether all of the eighty-six depositions transcribed for the plaintiff were reasonably necessary, pursuant to our order at the status hearing in October, the plaintiff supplemented its bill of costs with a list of the deposition witnesses, the employment of each witness for the years involved in the lawsuit, a description of the subjects covered in each deposition, and the cost of each deposition. The total amount of the request for deposition transcripts was $62,105.78. The defendants objected to the requests for the entire cost of ten depositions and to the requests for part of the cost of eight depositions. The total amount objected to is $14,403.24. A total of $47,702.54 for the cost of deposition transcripts is not objected to by the defendants.

Seven of the ten depositions which the defendants now argue should not have been taken at all were depositions of people listed by the defendants as potential trial witnesses in the Final Pretrial Order, although none were called at the trial. The plaintiff acted reasonably in taking the depositions of anyone identified by the defendants as trial witnesses and in having those depositions transcribed. Moreover, even if those depositions were taken before the Final Pretrial Order was prepared, the defendants' subsequent inclusion of those names in that order indicates that, contrary to the defendants' present argument, the information those people had on the subject matter of this suit was not so irrelevant or so unimportant that their depositions were outside the bounds of discovery. The costs of the depositions of Barber, Pia, Jordanoff, Stroomer, Curto, Wasz and McLean, therefore, will be awarded. The total cost for those seven depositions was $5,588.42.

The defendants object to the request for the cost of Louis A. Ruble's deposition. According to the defendants, Ruble's deposition was taken immediately prior to his testimony at the trial, and the transcript of the deposition was not available for use at the trial. The $113.00 requested for Ruble's deposition, therefore is disallowed.

The defendants argue that only twenty percent of the cost of Theodore K. Eckhardt's deposition should be taxed. Eckhardt was the manager of defendant Yoder's Chicago sales office during the events which gave rise to this lawsuit. He testified twice at the trial. The defendants claim that thirty percent of the cost of his deposition should be disallowed because it was spent on "extraneous" matters "such as the early negotiations between Grohne [the plaintiff's president] and Yoder, technical aspects of the Yoder mill, and the production capacities of other tube mill manufacturers." Copperweld's Supplemental Memorandum in Opposition to Independence's Request for Reimbursement of Certain Costs, p. 8. That type of background information, however, was an appropriate subject for a deposition in this case and is not

outside the bounds of discovery. The defendants also argue that fifty percent of the cost of Eckhardt's deposition should be disallowed because, although the subject matter was discoverable, "Eckhardt's examination was unnecessarily prolonged and repetitive. Eckhardt's deposition is some three hundred pages longer than William Waters' deposition and nearly twice as long as Douglas Yoder's deposition. As the court may recall, Waters and Yoder were far more important as witnesses in this case than Mr. Eckhardt." *Id.* That comparison is meaningless, however, and does not prove that Eckhardt's deposition was unduly prolonged. There are many explanations for the length of Eckhardt's deposition: it covered more subjects than either Waters' or Yoder's; the subjects were covered with appropriate though detailed and extensive examination; and there were numerous objections of defense counsel. Since the defendants concede that the subject matter covered was within the bounds of discovery and have not shown that the deposition was unnecessarily long, the total amount for Eckhardt's deposition will be awarded.

The defendants' remaining objections are made on two grounds. First, the defendants object to requests for the cost of any part of a deposition which did not relate to any issue presented at trial. Specifically, the defendants argue that the plaintiff cannot recover costs attributable to questions regarding functional discounts since we held at trial that evidence of functional discounts was irrelevant, or costs attributable to questions relating to the plaintiff's monopolization claim since that count of the complaint was dismissed before the trial began. The defendants' objection, however, is not sufficient. The standard for awarding the cost of depositions is not whether the deposition was related to an issue presented at trial but whether it was related to an issue which was present in the case at the time the deposition was taken. These depositions were taken before the monopoly claim was dismissed and before our trial ruling on the issue of functional discounts, i.e., when those issues were still part of the case. Depositions or portions of depositions which

relate to those issues, therefore, were "reasonably necessary," and those costs are proper under section 1920(2).

The defendants' second objection is to the request for the cost of depositions or parts of depositions where the witnesses could not answer the particular questions asked, or the witnesses' answers were not helpful to the plaintiff, or the witnesses were not called at trial. That is an adequate objection, however, only if the plaintiff should have known before taking the deposition or asking the questions that the witnesses would not have any useful information. All of the witnesses deposed by the plaintiff were employed in positions in companies which were involved in the subject matter of this suit. It was not unreasonable, therefore, for the plaintiff to think that they might have some knowledge relevant to the suit and to depose them.

Insofar as the defendants' objection relates to only parts of a deposition, they are apparently arguing that upon discovering that the witness did not know anything about a particular topic, it was unreasonable for the plaintiff to have those portions of the deposition covering that topic transcribed. That argument, however, imposes upon the court reporter and the plaintiff the impossible task of deciding and designating which portions of the deposition should be transcribed and which should not be. Since most portions of the deposition, by the defendants' admission, should have been transcribed, it was not unreasonable for the plaintiff to have the entire deposition transcribed without distinction between the useful and useless portions.

The defendants object to the entire cost of the transcript of Clay on the ground that he did not have any relevant knowledge. If the deposition was useless, the plaintiff should not have had it transcribed, and we will disallow the entire cost of Clay's deposition. ($64.00)

The plaintiff will be awarded $61,928.78 for the cost of deposition transcripts.

B. Court Reporter—Court Proceedings

The plaintiff requested $3,750.00 for 7,500 pages of trial proceedings which were transcribed at the regular transcription rate. That amount will be taxed: even if the transcript was not reasonably necessary for use during the trial itself, the transcript was essential for use by the plaintiff in responding to the defendants' post-trial motions.

The plaintiff also requested $5,626.80 for 3,216 pages of trial transcript billed at the higher rate for expedited daily copy. When deciding whether to tax the additional cost of daily transcripts, courts consider several factors: the length of the trial and the complexity of the issues, *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F.Supp. 143, 163 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Kaiser Industries Corp.* v. *McLouth Steel Corp.*, 50 F.R.D. 5 (E.D.Mich. 1970); *cf. Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 234 (1964) (cost of daily transcript disallowed based on district court's personal knowledge that this was not a complicated or extended trial where lawyers were requested to submit briefs and proposed findings); "whether a daily transcript was necessary to minimize disagreement over the testimony of witnesses, and whether proposed findings of fact were required," *Advance Business Systems*, 287 F.Supp. at 163; whether the case "involved expert witnesses whose cross-examination required knowledge of the exact wording of their previous testimony or that of any other witness," *United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO* v. *Lee National Corp.*, 62 F.R.D. 194, 196 (S.D.N.Y. 1974); the size of the claim, and the importance of witness credibility. *Galella* v. *Onassis*, 487 F.2d 986, 999 n.22 (2d Cir. 1973).

At the hearing in October, the defendants agreed to pay the expedited rate for half of the pages which the plaintiff received at that rate (1608 x 1.75 = $2,814.00). The plaintiff agreed to an award of the other half at the regular rate (1608 x .50 = $804.00).

Finally, the plaintiff requested $500.35 for transcripts of pretrial proceedings. In determining whether the cost of transcripts of pretrial hearings should be taxed,

> the Court must consider both the length and complexity of the whole case and what transpired at the hearings for which [plaintiff] seeks the costs of transcripts. If the proceedings were devoted to limiting and clarifying the issues which were to be heard at a lengthy trial and if such proceedings were of a magnitude that a transcript was needed to determine how the trial would proceed, then a transcript would of course be justified. However if these pretrial hearings did not greatly clarify the trial issues and if their substance could have been determined from the Court's orders and memoranda, then the plaintiff is not entitled to the costs of transcripts of them.

Sperry Rand Corp. v. *A-T-O, Inc.*, 58 F.R.D. 132, 138 (E.D.Va. 1973). *See also Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 678 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). In view of the length, complexity, and importance of the pretrial proceedings in this case, the $500.35 requested is reasonable and will be taxed against the defendants.

The plaintiff, therefore, is awarded $4,554.00 for trial transcripts at the daily rate; $2,814.00 for trial transcripts at the expedited rate; and $500.35 for the transcripts of pretrial hearings. The total award for the cost of the transcripts of court proceedings is $7,868.35.

C. Expert Witness Fees and Expenses

Section 1920 specifically provides that "[f]ees and disbursements for ... witnesses" may be taxed. The defendants argue, however, that fees for expert witnesses should not be taxed in this case because expert witnesses were not reasonably necessary to the plaintiff's case. Two of the plaintiff's experts testified about the damages caused to the plaintiff by the defendants' exclusion of plaintiff from the structural

steel tubing market; one expert testified about the capabilities of the Yoder mill by examining the blueprints and specifications. All of this testimony was necessary to enable the plaintiff to prove its case on damages, *i.e.*, to prove what the plaintiff would have been able to earn if the defendants had not acted tortiously, the Yoder mill had been delivered and the plaintiff had been able to enter the market. Most of the information and analysis given by the experts was not within the limits of common sense or experience, so a jury, comprised of nonexperts, could not have intelligently addressed the issues without expert opinion as a basis for its consideration. Presumably, the defendants would have objected if the plaintiff had solicited this type of opinion from nonexpert witnesses. The plaintiff would have been foolhardy to present a complex case such as this to the jury without any expert opinion, particularly since the defendants called four experts. Expert witnesses, therefore, were essential in the plaintiff's case, and fees and expenses may be awarded as costs.

The defendants also argue that the fees for the plaintiff's expert Albert Madansky should not be taxed because the jury "completely repudiated his overblown damages theories." Although the jury award was less than the amount suggested by Madansky, his testimony was not necessarily useless to the jury. Since the Court was not the trier of fact, we do not know that Madansky was not helpful even if the jury disagreed with him in part. Defendants' argument, therefore, does not justify disallowing an award of fees for Madansky.

The plaintiff also requests reimbursement for the fees paid to the defendants' experts for the time the plaintiff spent deposing them and for their travel expenses. These experts were called by the defendants at trial, and the plaintiff's counsel used the depositions before and at trial to prepare for cross examination, to impeach the witnesses, and to refresh recollection. The defendants suggest, however, that the depositions of the defense experts were unnecessary since the

plaintiff should have discovered the experts' opinions by using interrogatories. That argument exaggerates the usefulness of the latter device, which is designed to identify discreet information or sources of information not to elicit opinions on complex issues where the detailed cross examination allowed by deposition is imperative. Since the plaintiff's depositions of the defendants' experts were necessary for use in the case, the appropriate costs should be taxed against the defendants.

However, although the plaintiff can recover fees and expenses for expert witnesses in this case, it "may recover as costs of suit for expert witnesses only the amounts specified in 28 U.S.C. § 1821." *State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855, 865-66, and n.12 (7th Cir. 1981). *See also Henkel* v. *Chicago St. Paul M & O Ry.*, 284 U.S. 444 (1932); *Fey* v. *Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974).[5] Under section 1821, a witness can be paid $30.00 per day for each day's attendance at deposition or trial, or time spent going to and returning from the deposition or trial. 28 U.S.C. § 1821(b). Therefore, the correct measure for taxing fees for expert witnesses is not the amount the expert charged the plaintiff, nor is time spent by an expert consulting with attorneys or preparing to testify taxable. Furthermore, under section 1821, the taxable expenses of a witness are actual travel expenses if travel is by common carrier at the most economical rate reasonably available, 28 U.S.C. § 1821(c)(1) or the mileage allowance prescribed for federal government employees if travel is by privately-owned vehicle, 28 U.S.C. § 1821(c)(2); charges for taxis and other

[5] The court in *Sangamo* stated that fees and expenses above the statutory limits can be awarded in "exceptional circumstances." 657 F.2d at 865 n.14. The court, however, did not define the exceptional circumstances which might justify such an award nor has the plaintiff identified any present in this case. Since there is nothing that distinguishes this case from other antitrust cases in which expert witnesses are called, we will not award costs above the statutory limits.

miscellaneous expenses, 28 U.S.C. § 1821(c)(3); and a subsistence allowance when an overnight stay is required, not to exceed the maximum per diem for federal government employees. 28 U.S.C. § 1821(d). The amount taxable is the amount actually paid or the statutorily-defined amount, whichever is less.

After we held at the hearing in October that we would apply the standards of *State of Illinois* v. *Sangamo Construction* in this case, the plaintiff altered its request for expert witness fees and travel expenses to comply with that decision. The plaintiff reduced its request to $1,142.00 from $42,676.59. The defendants' only objection to the lower figure is that it includes a fee for two days in which an expert attended the trial and consulted with the plaintiff's counsel but did not testify. Those costs are not recoverable, 657 F.2d at 867 n.15, and the plaintiff's request will be reduced by $60.00. The plaintiff, therefore, will be awarded $1,082.00 for expert witness fees and expenses.

D. Witness and Travel Expenses

In its supplement to the bill of costs, the plaintiff reduced its request for costs for witness fees and travel expenses to $2,832.66 from $4,787.20. That request includes $1,313.00 for fees and expenses of several trial witnesses who were outside the subpoena power of this Court. At the hearing in October, we held, over the defendants' objection, that the plaintiff could be reimbursed for those fees and expenses, within the statutory limitations. Such an award is within the discretion of the trial court, *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 232 (1964), and depends upon the relevancy and materiality of the witnesses' testimony and, for trial witnesses, the importance of presenting live testimony rather than reading depositions at the trial. *See Marcoin, Inc.* v. *Edwin K. Williams & Co.*, 88 F.R.D. 588, 591 (E.D.Va. 1980); *Dorothy K. Winston & Co.* v. *Town Heights Development, Inc.*, 68 F.R.D. 431, 433 (D.D.C. 1975). We found that the testimony of Foster, Deichmann, and Ayers was important to the

presentation of this case and that, in this trial as in most trials, the live testimony was far preferable.

Although, to reflect the statutory limitations on an award for such expenses, the plaintiff reduced its request for costs of witnesses beyond our subpoena power, the defendants object to part of the reduced request. According to the defendants, the request includes charges for the federal per diem rate even though the plaintiff did not pay expenses equal to or exceeding that amount but paid $57.38 less than the federal per diem rate. Under those circumstances, the plaintiff's request will be further reduced by $57.38.

The plaintiff's supplemental request for witness fees and expenses includes $1,484.36 for twelve witnesses who were deposed but were not called at trial and for two witnesses who were subpoenaed by the plaintiff to appear at the trial but who were not called by the plaintiff.[6] Since those depositions were reasonably necessary, *see* discussion on costs for transcripts of depositions, *supra*, and since the amounts requested are within the statutory limitations for witness fees and expenses, the amounts requested for witness fees and expenses for witnesses deposed but not called at trial are taxable.

If a witness is subpoenaed to appear at trial in good faith, the costs may be taxed even if the witness does not actually testify. *Christian* v. *Tackett*, 86 F.R.D. 220, 222 (N.D.Miss. 1979). In this case, the witnesses were subpoenaed by the plaintiff to testify in the plaintiff's defense of the defendants' counterclaim. The plaintiff could not have known which witnesses would be necessary for that defense until the defendants as counterplaintiffs presented their case. *See id. See also Dasher* v. *Mutual Life Insurance Co. of New York*, 78 F.R.D. 142, 144 (S.D.Ga. 1978). Since the testimony of these two witnesses may have been necessary had the

[6] At the hearing in October, the plaintiff agreed to exclude from its amended request the fees and costs of one witness subpoenaed but not actually called.

defendants' presentation of the counterclaim progressed differently,[7] the plaintiff subpoenaed them in good faith, and costs within the statutory limitation are taxable.

The defendants objected to the plaintiff's original request for $1,521.00 paid by the plaintiff to Welded Tube Co. According to the plaintiff, Welded Tube insisted that the plaintiff pay the cost of locating the copying documents requested by a subpoena, and the plaintiff paid the amount rather than litigate the issue. We held at the hearing in October that the plaintiff could recover the costs of copying the documents and the witness fee and travel expenses but not the finding fee. In its supplement to the bill of costs, the plaintiff states that the witness fee was $21.00 and the copying charges for the Welded Tube materials were $14.30 (143 pages at $.10 a page). The plaintiff, therefore, can be reimbursed for $35.30, paid to Welded Tube.

The plaintiff is entitled to an award of $2,775.28 for witness fees and expenses.

E. Photocopying, Charts, Photographs

Section 1920 allows the court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). Photocopying charges attributable to discovery and the court's copies of pleadings, motions and memoranda are "reasonably necessary for use in the case" and can be awarded. Extra copies of filed papers and correspondence, and copies of cases, however, are not necessary but are for the convenience of the attorneys and therefore not taxable.

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[7] The plaintiff subpoenaed one witness to testify about the confidentiality of documents which the defendants alleged were unlawfully taken by Grohne. This testimony became unnecessary when we excluded the documents at trial. The plaintiff decided that the second witness' testimony, which would have been about employees who left Regal during the time the defendants alleged that Grohne was inducing them to join the plaintiff, was unnecessary after the defendants presented their evidence.

The proper test for taxing the cost of charts, photographs and similar items is not whether they were used at trial, but whether they were necessary to an understanding of an issue and a material aide to the jury; costs of demonstrative materials which were merely illustrative of expert testimony, other adequate evidence, or argumentative matter are not taxable. *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F.Supp. 143, 164 n.9 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970) (The cost of materials to accompany testimony is taxable "only if their preparation was 'necessary in order to have the court understand what may otherwise have been on the record, but what would have been incomprehensible to the inexpert mind.' "); *Esler* v. *Safeway Stores, Inc.*, 77 F.R.D. 479, 483 (W.D.Mo. 1978); *Mikel* v. *Keer*, 64 F.R.D. 93, 95 (E.D. Okla. 1973), *aff'd*, 499 F.2d 1178 (10th Cir. 1974); *Bowland* v. *Kitchens*, 63 F.R.D. 385, 388 (N.D.Miss. 1974); *Hill* v. *Gonzalez*, 53 F.R.D. 1 (D.Minn. 1971); *Kaiser Industries Corp.* v. *McLouth Steel Corp.*, 50 F.R.D. 5 (E.D.Mich. 1970); 6 Moore's Federal Practice, ¶ 54.77[6]. At the hearing in October, after we described the standards we would apply in taxing the costs for photocopying, charts, and photographs, the parties agreed that the defendants would reimburse the plaintiff for one-half of those costs ($13,458.43).

F. Computerized Legal Research

Although the cost of computerized legal research is not on the list of taxable costs in section 1920, "a district court retains limited discretion under Rule 54(d) to award as costs of suit expenses not specifically allowed by statute . . . ." *State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d at 864 n.11. The use of computer aides in research is "reasonable, if not essential, in contemporary legal practice," *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 285 (3d Cir. 1980), and "replaces by instantaneous and supposedly infallible retrieval, many hours which would be billable if performed by human talent." *Pitchford Scientific Instruments Corp.* v. *Pepi, Inc.*, 440 F.Supp. 1175, 1178 (W.D.Pa. 1977) *aff'd*, 582 F.2d 1275 (3d

Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Even without a specific showing of cost effectiveness in this case, therefore, an award of such costs is appropriate, and, based on the list of the subjects researched, which is contained in the plaintiff's supplement to its bill of costs, $5,093.33 is a reasonable amount.

G. *Docket Fees*

The plaintiff is entitled to be awarded docket fees of $291.00.

H. Conclusion

For the reasons stated above, the Plaintiff is awarded the following costs:

(1)	Court Reporter—depositions	$61,928.78
(2)	Court Reporter—court proceedings	7,868.35
(3)	Experts Witness Fees and Expenses	1,082.00
(4)	Witness Fees and Travel Expenses	2,775.28
(5)	Photocopying, Charts, Photographs	13,458.43
(6)	Computerized Legal Research	5,093.33
(7)	Docket Fees	291.00
		$92,497.17

CONCLUSION

For the reasons stated above, the plaintiff is awarded attorneys' fees of $1,722,175.53 plus interest from the date hereof; the order of June 22, 1981 is vacated; and costs of $92,497.17 plus interest from the date hereof are taxed against the defendants.[1]

HUBERT L. WILL
United States District Judge

DATED: June 21, 1982

[1] This Revised Memorandum Opinion replaces the Memorandum Opinion on the subject of fees and costs previously filed on January 19, 1982.

Appendix I—Noncompensable attorney hours

A. Jury instructions on the contract claim			
Associate hours	60.50 x $45.00 =		$ 2,722.50
B. Yoder settlement			
Associate hours	60.50 x $70.00 =	4,235.00	
Partner hours	11.25 x 110.00 =	1,237.50	
			$ 5,472.50
C. Ryerson issue			
Associate hours	7.00 x $55.00 =	385.00	
	43.25 x $60.00 =	2,595.00	
	28.50 x $70.00 =	1,995.00	
Partner hours	3.00 x 100.00 =	300.00	
			$ 5,275.00
D. Deere issue			
Associate hours	6.75 x $50.00 =	337.50	
	19.50 x $60.00 =	1,170.00	
	32.00 x $70.00 =	2,240.00	
	16.00 x $75.00 =	1,200.00	
	4.00 x $80.00 =	320.00	
			$ 5,267.50
E. Unfiled motion and appearance in other case			
Associate hours	6.25 x $55.00 =	343.75	
	5.50 x $80.00 =	440.00	
			$ 783.75
			$ 19,521.25

Appendix II—Time spent on damages

Associate hours	1399.25 x $ 66.84 =	$ 93,525.87
Partner hours	36.75 x $117.65 =	$ 4,323.64
Other*	602.75 x $ 75.26 =	$ 45,362.97
		$143,212.48

* For time spent on damages for which we could not determine the applicable hourly rate, we used the average rate for the plaintiff's attorneys of $75.26.

Appendix III—Noncompensable legal assistant hours

Amount requested			$243,564.05
Ryerson issue			
	48.50 x $30.00 =	$1,455.00	
	2.25 x $35.00 =	78.75	
Deere issue			
	27.75 x $30.00 =	832.50	
	26.50 x $35.00 =	927.50	
			- 3,293.75
			$240,270.30

APPENDIX D

APPENDIX D

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION,** a Pennsylvania corporation, and **REGAL TUBE COMPANY,** a Pennsylvania corporation, *Defendants.*	No. 76 C 4201

Pursuant to memorandum opinion and order entered this day, the motion of plaintiff to amend the award of interest on attorney's fees and costs is granted. Interest on the award, as amended by the order of June 21, 1982, shall be computed as of the date of the original order of the court, January 19, 1982.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION,** a Pennsylvania corporation, and **REGAL TUBE COMPANY,** a Pennsylvania corporation, *Defendants.*	No. 76 C 4201

MEMORANDUM OPINION AND ORDER

On January 19, 1982, Judge Will issued a memorandum opinion in this action in which he awarded to the plaintiff attorney's fees of $1,503,412.20 and costs of $92,497.17, with interest to be computed from that date. The plaintiff then filed a motion to amend the January 19 order, seeking primarily the correction of a mathematical error in the computation of legal assistant fees. A subsequent opinion was issued on June 21, 1982, in which Judge Will ruled that a decimal point was inadvertently misplaced and that the plaintiff therefore was entitled to an award of legal assistant fees in the amount of $240,000, rather than $24,000. The order provided that interest on the award should run from June 21, 1982.

Now the matter is before the court on a motion to amend the award of interest on attorney's fees and costs, providing interest from January 19, 1982. According to the plaintiff, when a court enters a new judgment merely to correct a mathematical mistake in the original judgment, the subsequent judgment should be entered *nunc pro tunc*. *See United States* v. *Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971). The plaintiff contends, therefore, that the award of

interest on the corrected order of June 21, 1982 should be computed as of the date the original order was entered, January 19, 1982.

The defendants, in opposition to the motion, refer to *Harris* v. *Chicago Great Western Ry. Co.*, 197 F.2d 829 (7th Cir. 1952), as authority for their position that interest on the corrected judgment should run only from the date of the subsequent decision and not from the date of the original order. That decision is not controlling here. We note further, that in *Harris*, the Seventh Circuit permitted interest to run as to costs as of the date of the original judgment. *Id.* at 836.

The court concludes that the equities of the situation warrant an award of interest from the date of the original judgment order issued on January 19, 1982. The plaintiff should not be made to suffer the consequences of another's innocent mistake. *See generally Perkins* v. *Standard Oil Co.*, 487 F.2d 672, 676 (9th Cir. 1973). Accordingly, the plaintiff's motion to amend the award of interest on attorney's fees and costs is granted. Interest on the award, as amended by the June 21, 1982 order, shall be computed as of the date of the original order of the court, January 19, 1982.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: July 16, 1982

APPENDIX E

APPENDIX E

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 21, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. _____
Hon. _____

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,
vs.
Nos. 81-2009 and 81-2148
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
and
DAVID F. GROHNE,
Counterdefendant, Appellee.

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Appellee,
vs.
No. 81-2183
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
and
DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76 C 4201, Hubert L. Will, Judge.

ORDER

This matter comes before the court on the filing of "UNOPPOSED MOTION TO ENTER AND CONSOLIDATE JUDGMENT" by defendants-appellants on December 15, 1982. In this motion appellants have informed

the court that they are willing not to contest the fees award currently under review in the appeal docketed in 82-2183 so long as that appeal is consolidated with the judgment entered in the appeals docketed in 81-2009 and 81-2148. The appellants' reason for foregoing review of the fees award at this time is to permit the appeal taken on the merits and the fees award both to be reviewed by the United States Supreme Court certiorari. Appellant has informed the court that appelle has no objection to the entry of judgment and the consolidation with the judgment entered in 81-2009 and 81-2148. Accordingly,

IT IS ORDERED that judgment is hereby entered against appellants in the appeal docketed in 82-2183.

IT IS FURTHER ORDERED that the judgment hereby entered in 82-2183 is hereby consolidated with the judgment already entered in appeal Nos. 81-2009 and 81-2148.

APPENDIX F

APPENDIX F

Opinion by Judge Cummings
JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 1, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. PHILIP NICHOLS, JR., Circuit Judge*
Hon. RICHARD D. CUDAHY, Circuit Judge

Nos. 81-2009 and 81-2148
INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,
vs.
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
vs.
DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4201
Hubert L. Will, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs to appellees, in accordance with the opinion of this Court filed this date.

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* Judge Nichols was an Associate Judge of the United States Court of Claims when this case was argued. He was sitting by designation. On October 1, 1982, he became a member of the newly created United States Court of Appeals for the Federal Circuit, with the title of Circuit Judge, by various provisions of Pub. L. No. 97-164.

APPENDIX G

APPENDIX G

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 1, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. PHILIP NICHOLS, JR., Circuit Judge*

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,
vs.
Nos. 81-2009, 81-2148
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
vs.
DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4201
Hubert L. Will, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellant Copperweld Corporation, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Philip Nichols of the United States Court of Appeals for the Federal Circuit is sitting by designation.

APPENDIX H

APPENDIX H

PARENT/SUBSIDIARY ANTITRUST DECISIONS
1982

Court of Appeals

1. Burlington Industries, Inc. v. Milliken & Company, 690 F.2d 380 (4th Cir. 1982)
2. White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982)
3. Murray v. Toyota Motor Distributors, Inc., 664 F.2d 1377 (9th Cir. 1982)
4. Reisner v. General Motors Corp., 671 F.2d 91 (2d Cir. 1982)
5. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982)
6. Industrial Invest. Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982)
7. Thomsen v. Western Electric Co., 680 F.2d 1263 (9th Cir. 1982)

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8. Galardo v. AMP Inc., 1982-1 Trade Cas. ¶ 64,468 (N.D. Cal. 1982)
9. Joseph Ciccone & Sons, Inc. v. Eastern Industries, Inc., 537 F. Supp. 623 (E.D. Pa. 1982)
10. Processed Plastic Co. v. Warner Communications Inc., No. 81C 3028 (N.D. Ill. April 20, 1982)

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12. Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981)
13. Owens v. Aetna Life & Casualty Co., 654 F.2d 218 (3d. Cir. 1981)

District Court

14. Reisner v. General Motors Corp., 511 F. Supp. 1167 (S.D.N.Y. 1981)

15. Island Tobacco Co. v. R. J. Reynolds Industries, Inc., 513 F. Supp. 726 (D. Hawaii 1981)
16. Bonjorno v. Kaiser Alum. & Chem. Corp., 518 F. Supp. 102 (E.D. Pa. 1981)
17. Merrit v. Libby, McNeil & Libby, 510 F. Supp. 366 (S.D.N.Y. 1981)
18. Re: TV Signal Company of Aberdeen v. AT&T, 1981-1 Trade Cas. ¶ 63,944 (D.S.D. 1981)
19. Thomsen v. Western Electric Co., 512 F. Supp. 128 (N.D. Cal. 1981)
20. United States v. Cotton Baking Co., 513 F. Supp. 223 (M.D. La. 1981)
21. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100 (E.D. Pa. 1981)

1980

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22. Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)
23. Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980)
24. Schwimmer v. Sony Corp. of America, 637 F.2d 41 (2d Cir. 1980)

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25. In re Folding Carton Antitrust Litigation, 1980-2 Trade Cas. ¶ 63,439 (N.D. Ill. 1980)
26. General Glass Co. v. Globe Glass and Trim Co., 1980-2 Trade Cas. ¶ 63,531 (N.D. Ill. 1980)
27. The Mullen Co. v. Agfa-Gevaert, Inc., No. 79C 2773 (N.D. Ill. July 3, 1980)
28. Montana v. Pacific Hide and Fur Depot., 1980-81 Trade Cas. ¶ 63,709 (D. Mont. 1980)

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29. In the Matter of Herbert R. Gibson, Sr., 95 F.T.C. 553 (1980)

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30. Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979)
31. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979)
32. Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979)
33. Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979)
34. Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369 (10th Cir. 1979)
35. Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979)
36. Reno-West Coast Distribution Co. v. Mead Corp., 613 F.2d 722 (9th Cir. 1979)
37. Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962 (5th Cir. 1979)

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38. Rosenberg v. United Parcel Service of America, Inc., 1979-1 Trade Cas. ¶ 62,703 (S.D.N.Y. 1979)
39. Amanini, et al. v. Armstrong Cork Co., 1980-1 Trade Cas. ¶ 63,010 (S.D.N.Y. 1979)
40. Citicorp v. Interbank Card Association, 478 F. Supp. 756 (S.D.N.Y. 1979)
41. Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979)
42. In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 478 F. Supp. 785 (N.D. Cal. 1979)
43. Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (S.D.N.Y. 1979)
44. Far Eastern Coconut Co. v. Sun Ripe Coconut Corp., 1979-2 Trade Cas. ¶ 62,878 (E.D.N.Y. 1979)
45. In Re: Fine Paper Antitrust Litigation, 82 F.R.D. 143 (E.D. Pa. 1979)

46. First Stop Bookshop, Inc. v. Matthews Book Co., Inc., 476 F. Supp. 1054 (E.D. Mo. 1979)
47. Howard Fisher v. Coca-Cola Bottling Co., 1979-1 Trade Cas. ¶ 62,514 (C.D. Cal. 1979)
48. Las Vegas Drive-In Theatre, Inc. v. National General Theatres, Inc., 1979-2 Trade Cas. ¶ 62,895 (D. Nev. 1979)
49. Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841 (N.D. Cal. 1979)
50. Speed Auto Sales, Inc. v. American Motors Corp., 477 F. Supp. 1193 (E.D.N.Y. 1979)
51. United Roasters, Inc. v. Colgate-Palmolive Company, 485 F. Supp. 1041 (E.D.N.C. 1979)
52. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 478 F. Supp. 889 (E.D. Pa. 1979)

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54. Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp., 579 F.2d 20 (3d Cir. 1978)
55. H&B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)

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57. Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978)
58. Oahu Gas Service, Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359 (D. Hawaii 1978)
59. Schaben v. Samuel Moore & Co., 462 F. Supp. 1321 (S.D. Iowa 1978)
60. Universal Lite Distributors, Inc. v. Northwest Industries, Inc., 452 F. Supp. 1206 (D. Md. 1978)

1977

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61. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)
62. United States Steel Corp., v. Fortner Enterprises, Inc., 429 U.S. 610 (1977)

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63. Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90 (3d Cir. 1977)
64. Call Carl, Inc. v. BP Oil Corporation, 554 F.2d 623 (4th Cir. 1977)
65. Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72 (3d Cir. 1977)
66. Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977)

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67. Brager & Co. v. Leumi Securities Corp., 429 F. Supp. 1341 (S.D.N.Y. 1977)
68. Du Pont Glore Forgan Incorp. v. AT&T, 437 F. Supp. 1104 (S.D.N.Y. 1977)
69. Giant Paper and Film Corp. v. Albemarle Paper Co., 430 F. Supp. 981 (S.D.N.Y. 1977)
70. Industria Siciliana Asfalti, Biutmi, S.p.A. v. Exxon Research & Engineering Co., 1977-1 Trade Cas. ¶ 61,256 (S.D.N.Y. 1977)
71. Las Vegas Sun, Inc. v. Summa Corp., 1977-2 Trade Cas. ¶ 61,556 (D. Nev. 1977)
72. Photovest Corp. v. Fotomat Corp., 1977-1 Trade Cas. ¶ 61,529 (S.D. Ind. 1977)
73. Wolff v. Ford Motor Co., 1977-1 Trade Cas. ¶ 61,409 (S.D.N.Y. 1977)

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74. Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976)

75. Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976)
76. FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976)
77. International Railways of Central America v. United Brands Co., 532 F.2d 231 (2d Cir. 1976)
78. Link v. Mercedes-Benz of North America, Inc., 1976-2 Trade Cas. ¶ 61,002 (3d Cir. 1976)
79. Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501 (3d Cir. 1976)
80. Timberlane Lumber Co. v. Bank of America, N.T.&S.A., 549 F.2d 597 (9th Cir. 1976)
81. Triebwasser & Katz v. AT&T, 535 F.2d 1356 (2d Cir. 1976)

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82. Aaron E. Levine & Co. v. Calkraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976)
83. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 1976-2 Trade Cas. ¶ 61,212 (E.D. La. 1976)
84. Bonda's Veevoederfabriek, Provimi, B.V. v. Provimi, Inc., 425 F. Supp. 1034 (E.D. Wis. 1976)
85. Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110 (E.D.N.Y. 1976)
86. Inter City Oil Co. v. Murphy Oil Corp., 1976-1 Trade Cas. ¶ 60,948 (D. Minn. 1976)
87. Snyder v. Howard Johnson's Motor Lodges, Inc., 412 F. Supp. 724 (S.D. Ill. 1976)
88. Joe Westbrook v. Chrysler Corp., 419 F. Supp. 824 (N.D. Ga. 1976)
89. I. S. Joseph Co. v. Mannesmann Pipe & Steel Corp., 408 F. Supp. 1023 (D. Minn. 1976)
90. Leeward Petroleum, Ltd. v. Mene Grande Oil Co., 415 F. Supp. 158 (D. Del. 1976)
91. Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F. Supp. 1009 (C.D. Cal. 1976)
92. Purex Corp. v. Procter & Gamble Co., 419 F. Supp. 931 (C.D. Cal. 1976)

93. REA Express, Inc. v. Alabama Great S.R.R. Co., 427 F. Supp. 1157 (S.D.N.Y. 1976)

94. Nestler v. Exxon Corp., 1976-1 Trade Cas ¶ 60,876 (D.D.C. 1976)

95. Triebwasser & Katz v. AT&T, 1976-1 Trade Cas. ¶ 60,769 (S.D.N.Y. 1976)

96. United States v. AT&T, 427 F. Supp. 57 (D. Colo. 1976)

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97. Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975)

98. Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company, 513 F.2d 102 (2d Cir. 1975)

District Court

99. Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975)

100. Chastain v. AT&T, 401 F. Supp. 151 (D. Colo. 1975)

101. Benoit v. Burlington Industries, Inc., 1976-1 Trade Cas. ¶ 60,686 (S.D.N.Y. 1975)

102. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 921 (N.D. Cal. 1975)

103. International Railways of Central America v. United Brands Co., 405 F. Supp. 884 (S.D.N.Y. 1975)

104. Hemley v. American Honda Motor Co., 1975-2 Trade Cas. ¶ 60,457 (S.D.N.Y. 1975)

105. Cromar Co. v. Nuclear Materials & Equipment Corp., 395 F. Supp. 198 (M.D. Pa. 1975)

106. Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221 (S.D.N.Y. 1975)

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107. Chisholm Bros. Farm Equipment Co. v. International Harvester Company, 498 F.2d 1137 (9th Cir. 1974)
108. Battle v. Liberty National Life Insurance Co., 493 F.2d 39 (5th Cir. 1974)
109. Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir. 1974)

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110. Armen De Fillippo v. Ford Motor Company, 378 F. Supp. 456 (E.D. Pa. 1974)
111. Coleman Motor Co. v. Chrysler Corp., 376 F. Supp. 546 (W.D. Pa. 1974)
112. Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974)
113. Benoit v. Burlington Industries, Inc., 1974-2 Trade Cas. ¶ 75,295 (S.D.N.Y. 1974)
114. Heatransfer Corp. v. Volkswagenwerk A.G., 1975-1 Trade Cas. ¶ 60,308 (S.D. Tex. 1974)
115. HEW Corp. v. Tandy Corp., 1974-2 Trade Cas. ¶ 75,190 (D. Mass. 1974)
116. Dobbins v. Kawasaki Motors Corp., 1974-1 Trade Cas. ¶ 75,100 (D. Or. 1974)
117. Moraine Products v. ICI America, Inc. 379 F. Supp. 261 (N.D. Ill. 1974)
118. In re Nissan Motor Corp. Antitrust Litigation, 385 F. Supp. 1253 (Jud. Pan. Multi. Lit. 1974)
119. Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974 Trade Cas. ¶ 75,054 (D. Utah 1974)
120. In re West Coast Bakery Flour Antitrust Litigation, 383 F. Supp. 842 (Jud. Pan. Multi. Lit. 1974)

1973

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121. Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973)

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122. Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972)
123. Honeywell, Inc. v. Sperry Rand Corp., 1974 Trade Cas. ¶ 74,874 (D. Minn. 1973)
124. I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868 (S.D.N.Y. 1973)
125. International Railways of Central America v. United Brands Co., 358 F. Supp. 1363 (S.D.N.Y. 1973)
126. Di Costanzo v. Chrysler Corp., 57 F.R.D. 495 (E.D. Pa. 1972)
127. In re Penn Central Securities Litigation, 367 F. Supp. 1158 (E.D. Pa. 1973)
128. Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973)
129. Suburban Car Rentals, Inc. v. International Telephone and Telegraph Corp., 1973-1 Trade Cas. ¶ 74,552 (S.D.N.Y. 1973)

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130. Ark Dental Supply v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972)
131. Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir. 1972)

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132. America's Best Cinema Corp. v. Fort Wayne Newspapers, 347 F. Supp. 328 (N.D. Ind. 1972)

1971

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133. United States v. Armour & Co., 402 U.S. 673 (1971)

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134. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971)

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135. Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971)

1970

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136. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970)

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137. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970)

138. Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930 (D. Neb. 1970)

139. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970)

1969

Supreme Court

140. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)

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141. Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969)

142. Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)

1968

Supreme Court

143. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)

District Court

144. Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968)

1967

Court of Appeals

145. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967)

District Court

146. Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967)

147. United States v. Blue Chip Stamp Co., 1967 Trade Cas. ¶ 72,087 (C.D. Cal. 1967)

1966

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148. International Railways of Central America v. United Fruit Co., 254 F. Supp. 233 (S.D.N.Y. 1966)

149. Phi Delta Theta Fraternity v. J. A. Buchroeder & Co., 251 F. Supp. 968 (W.D. Mo. 1966)

150. Reines Distributors, Inc. v. Admiral Corporation, 1966 Trade Cas. ¶ 71,838 (S.D.N.Y 1966)

151. Richardson v. Chrysler Motors Corp., 257 F. Supp. 547 (S.D. Tex. 1966)

1965

Supreme Court

152. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965)

District Court

153. Carolina Scenic Stages, Inc. v. Greyhound Corp., 38 F.R.D. 313 (D.S.C. 1965)

154. Highland Supply Corp. v. Reynolds Metals Co., 238 F. Supp. 561 (E.D. Mo. 1965)

155. Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y. 1965)

1964

District Court

156. Miami Drive-In Theatre, Inc. v. Paramount Pictures Corporation, 1964 Trade Cas. ¶ 71,247 (S.D.N.Y. 1964)

157. Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593 (N.D. Ill. 1964)

F.T.C.

158. In the Matter of Bearings, Inc., 64 F.T.C. 373 (1964)

1963

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159. Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir. 1963)

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160. Aerojet-General Corp. v. Aero-Jet Products Corp., and Plasti-Kote, Inc., 33 F.R.D. 357 (N.D. Ohio 1963)

161. Castlegate, Inc. v. National Tea Co., 34 F.R.D. 221 (D. Colo. 1963)

F.T.C.

162. In the Matter of Luria Brothers and Company, Inc., 62 F.T.C. 243 (1963)

1962

Supreme Court

163. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)

164. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962)

District Court

165. Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962)

1962

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166. Alpha Distributing Co. v. Jack Daniel's Distillery, Inc., 207 F. Supp. 136 (N.D. Cal. 1961)

1960

Court of Appeals

167. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960)

District Court

168. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960)

F.T.C.

169. In the Matter of The Roberts Co., 56 F.T.C. 1569 (1960)

1959

District Court

170. Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959)

1958

District Court

171. Honnah B. Streiffer v. Seafarers Sea Chest Corp., 1958 Trade Cas. ¶ 69,074 (E.D. La. 1958)

172. United States v. Standard Oil Company (New Jersey), 1958 Trade Cas. ¶ 69,206 (1958)

1957

District Court

173. Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216 (D. Minn. 1957)

1956

District Court

174. Bertha Bldg. Corp. v. National Theatres Corp., 140 F. Supp. 909 (E.D.N.Y. 1956)

175. Milwaukee Towne Corp. v. Loew's Inc., 139 F. Supp. 809 (N.D. Ill. 1956)

1955

District Court

176. Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 1956 Trade Cas. ¶ 68,277 (S.D.N.Y. 1955)

177. Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955)

F.T.C.

178. In The Matter of Eastman Kodak Company, 51 F.T.C. 541 (1955)

1954

District Court

179. Avon Pub. Co. v. American News Co., 122 F. Supp. 660 (S.D.N.Y. 1954)

1952

District Court

180. Adolphus M. Burroughs v. Warner Bros. Pictures, Inc., 12 F.D.R. 491 (D. Mass. 1952)

1951

Supreme Court

181. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951)

182. Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)

183. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)

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184. United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir. 1951)

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185. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951)

1950

Court of Appeals

186. Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F.2d 196 (9th Cir. 1950)

1949

Court of Appeals

187. United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949)

1948

Supreme Court

188. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)

189. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)

1947

Supreme Court

190. United States v. Yellow Cab Co., 332 U.S. 218 (1947)

APPENDIX I

APPENDIX I

THE PRESENT STATUS OF THE INTRACORPORATE CONSPIRACY DOCTRINE

MILTON HANDLER* AND THOMAS A. SMART**

One of the most controversial doctrines in modern antitrust law is the concept of intracorporate or intra-enterprise conspiracy which, for purposes of section 1 of the Sherman Act,[1] treats as separate actors members of the same corporate family, either a parent and its subsidiary or affiliated companies which have a commmon parent.[2] It is a doctrine with numerous critics and few friends.[3] The principal criticism is

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[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1976).

[2] Some commentators have confined use of the word "intracorporate" to situations in which officers of a single corporation engage in conduct among themselves in carrying out the business of the corporation, and have reserved the word "intra-enterprise" for dealings between a parent and its subsidiaries or between affiliates. *E.g.*, Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158 (1962). However, because the courts commonly use the phrase "intracorporate conspiracy" interchangeably with "intra-enterprise conspiracy" to describe an alleged conspiracy between a parent and its subsidiary or between affiliated companies, we have done so as well.

[3] *See* Barndt, *supra* note 2; Handler, *Twenty-Five Years of Antitrust*, 73 COLUMN. L. REV. 415 (1973); Handler, *Through the Anti-*

(footnote continued on next page)

that where corporations are commonly owned or controlled and are in fact a single economic unit, they should be treated as such for purposes of section 1.

The problem of how to treat restrictive agreements between parents and subsidiaries or affiliates arises from the language of section 1 of the Sherman Act which forbids contracts, combinations and conspiracies in restraint of trade but does not prohibit restraints of trade as such. Section 2 of the Sherman Act, on the other hand, outlaws single firm behavior—monopolization and attempts to monopolize.[4]

(footnote continued from preceding page)

trust Looking Glass—Twenty-First Annual Antitrust Review, 57 CALIF. L. REV. 182 (1969) [hereinafter cited as *Antitrust Looking Glass*]; Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92 (1966) [hereinafter cited as *Misadventures in Antitrust*]; Handler, *Annual Review of Antitrust Developments*, 10 THE RECORD 332 (1955); Handler, *Contract, Combination or Conspiracy*, 3 A.B.A. ANTITRUST SECTION 38 (1953) [hereinafter cited as *Contract, Combination or Conspiracy*]; Handler, *Anti-trust—New Frontiers and New Perplexities*, 6 THE RECORD 59 (1951); Kempf, *Bathtub Conspiracies: Has* Seagram *Distilled a More Potent Brew?*, 24 BUS. LAW. 173 (1968); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977) [hereinafter cited as *Intra-Enterprise Conspiracy*]; Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?* 14 DUQ. L. REV. 63 (1975); Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372 (1954).

[4] "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony .

(footnote continued on next page)

Thus, section 1, unlike section 2, requires a plurality of actors for its violation; it takes two or more persons to contract, combine or conspire. Under section 1, a single firm might well act with impunity where two firms by agreement could not.[5] Consequently, otherwise lawful behavior may be deemed unlawful if it can be shown that in fact the conduct at issue was engaged in by two or more actors.[6] The fundamental issue is how to define a single actor.

The thesis of this Article is that a definition of a single actor should be determined in accordance with the goals of section 1 of the Sherman Act which is designed to prevent concerted action between distinct economic entities.[7] Surprisingly, most courts, in grappling with the issue of whether related corporations should be treated as seperate entities for purposes of section 1, have failed to consider the goals of antitrust in reaching their decisions. Cases which have held that subsidiaries and affiliates are capable of conspiring have

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(footnote continued from preceding page)

. . ." 15 U.S.C. § 2 (1976). Section 2 further prohibits combinations and conspiracies to monopolize.

[5] In *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919), the Court held that a manufacturer, acting alone, may unilaterally refuse to deal.

[6] For example, a corporation may lawfully refuse to deal with a customer under the *Colgate* doctrine, based on its own business judgment which the courts will not second guess. *Id.* On the other hand, under certain circumstances, it is unlawful for two or more corporations to agree that one of them will refuse to deal with another. *See, e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Thus, an otherwise lawful refusal by a distributor to deal with its customer could be turned into a violation of § 1 if it can be shown that the distributor acted at the behest of its parent corporation. *See* text accompanying notes 215-20 *infra*.

[7] *See Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). This case is discussed in full at notes 157-67 *infra* & accompanying text.

provided no adequate reason as to why a business enterprise that operates through subsidiaries should be held liable under section 1 when those that operate through divisions are not.[8]

When analysis is focused on antitrust policy as such, one can discern no basis for the intracorporate conspiracy concept. A review of the cases suggests that the intracorporate conspiracy doctrine does not promote competition or otherwise advance the purposes of antitrust, but more often serves principally as a tool for plaintiffs in private treble damage actions to attempt to reach single firm conduct which does not rise to the level of an attempt to monopolize or monopolization.[9] Indeed, conduct that is of any real concern is already covered under existing antitrust statutes and the laws of unfair competition.[10] Moreover, it is significant that in most of the reported cases a holding of intracorporate conspiracy is unnecessary to a finding of liability under section 1. To the extent that an argument can be made that conduct falling somewhere between the nets of sections 1 and 2 should be addressed by the antitrust laws, the intracorporate conspiracy doctrine is ill-suited to the task.[11]

The purpose of this Article is to review the origin of the intracoroprate conspiracy doctrine in the Supreme Court and its subsequent case history, to determine its present status, the role it plays in antitrust litigation, and how that role relates to the policy objectives of the antitrust laws. We analyze the various standards developed to determine a plurality of actors under section 1 and address the question of whether and in what circumstances separately incorpo-

[8] *See* text accompanying notes 101-08 *infra*.

[9] *See* Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 176 (1980).

[10] *See* text accompanying notes 207-34 *infra*.

[11] *See* text accompanying notes 235-40 *infra*.

rated but related corporations should be deemed capable of conspiring. Should a corporation face the spectre of antitrust liability when it decides for tax reasons to organize its distribution arm as a wholly owned subsidiary rather than as a division? Would antitrust policy be served by holding, for example, that a decisionmaker who wears two hats as president of a parent and its wholly owned or controlled subsidiary has conspired in restraint of trade when he sets the prices of the subsidiary's products? At what point does the degree of control or ownership become so attenuated that the policies of the antitrust laws would be served by holding that affiliated corporations are capable of conspiring?

We conclude that where a subsidiary is wholly owned or controlled by its parent or where affiliated corporations are wholly owned or controlled by the same parent, the policies of the antitrust laws would best be served by holding as a matter of law that the corporations are incapable of conspiring.[12] As long as two corporations share common ownership or control, there is no discernbile antitrust policy reason for holding that they are separate economic entities under section 1. The time has come to jettison the aberrant Supreme Court decisions and their progeny of confused and mischievous adjudications.

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[12] By "control" we mean the situation in which a parent, although holding less than 100 percent of the voting stock of a corporation, has sufficient voting control that, if it desires to do so, it could change the corporate form of the subsidiary. *See* text accompanying notes 235-41 *infra*. Unless otherwise noted, throughout this Article we have used the terms "subsidiary" and "affiliate" to mean subsidiaries that are wholly owned or controlled by their parents and affiliates which are wholly owned or controlled by a common parent.

I. The Origin of the "Weird Concept"[13] of Intracorporate Conspiracy

The intracorporate or intra-enterprise conspiracy doctrine has its origin in, and has drawn sustenance from, several Supreme Court decisions.[14] The pertinent opinions share three characteristics that account for the widespread criticism of the doctrine and have prompted efforts to develop alternative formulations of it. First and foremost is their potential reach. The decisions, read broadly, would subject enterprises doing business through subsidiaries to potential liability and criminal penalties under section 1 of the Sherman Act for legitimate discussions and agreements which, if engaged in by two separate, independent corporations, might be challenged as a conspiracy in restraint of trade.[15] Second, the decisions are characterized by a lack of analysis or consideration of the antitrust policy or economic justifications for imposing liability on such a broad basis. Third, it seems fair to say that in all but one case it was unnecessary for imposition of liability to invoke the intracorporate conspiracy doctrine.[16]

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[13] *Contract, Combination or Conspiracy*, *supra* note 3, at 46.

[14] *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

[15] For example, if a parent directs its wholly owned subsidiary to set a particular resale price for an item that the parent manufactures and the subsidiary distributes, the two corporations would be vulnerable to a claim of price-fixing under § 1.

[16] The intracorporate conspiracy doctrine may have been necessary to the result reached in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). *See* notes 30-42 *infra* & accompanying text.

Before turning to the Supreme Court cases, however, it is useful to review briefly *United States* v. *General Motors Corp.*,[17] which constitutes the first judicial acceptance of the notion that there can be a conspiracy between corporate affiliates. In *General Motors*, the Seventh Circuit upheld the conviction of General Motors and three of its wholly owned subsidiaries under section 1 of the Sherman Act for conspiracy to force GM dealers to finance their purchases and their sales of cars from GM's finance subsidiary. Defendants profferred a "single trader" defense,[18] contending that they were affiliated, noncompeting units engaged in a single enterprise and thus could not be held liable for conspiracy under section 1. The court gave this argument short shrift, reasoning simply that defendants could not "enjoy the benefits of separate corporate identity and escape the consequences. . . ."[19] It cited no authority or logic in support of this *ipse dixit*. Moreover, it stated that the "test of illegality under the Sherman Act is not so much the particular form of business organization effected [*sic*], as it is the presence or absence of retraint of trade and commernce,"[20] which is an incorrect statement of the law to the extent that it implies that a unilateral restraint of trade alone can satisfy the requirements of section 1. The court concluded that even if General Motors and its wholly owned subsidiaries were incapable of conspiracy, the defendants would nevertheless be liable on other grounds

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[17] 121 F.2d 376 (7th Cir.) *cert. denied*, 314 U.S. 618 (1941).

[18] Under contemporary antitrust nomenclature, the "single trader" defense refers not to the question of intracorporate conspiracy but to the *Colgate* doctrine. *See* note 6 *supra*. Although used on occasion in the cases and the intracorporate conspiracy literature, we refer to use the phrase "single enterprise" defense to avoid any possible confuction with the *Colgate* doctrine.

[19] 121 F.2d at 404.

[20] *Id.*

because the questioned practice constituted an illegal vertical contractual restraint.[21]

The Supreme Court first considered the question of whether there can be a conspiracy between corporate affiliates in *United States* v. *Yellow Cab Co.*[22] Defendants were Morris Markin, president, general manager and controlling shareholder of Checker Cab Manufacturing Corporation

[21] *Id.* One commentator has summarized the Seventh Circuit's holding as follows: "Form matters. Form does not *really* matter. Even if form did really matter, you're stuck anyhow." McQuade, *supra* note 3, at 191 (emphasis in original).

[22] 332 U.S. 218, 227 (1947). Prior to *Yellow Cab*, the Supreme Court had held affiliated corporations liable for § 1 violations in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944). However, it did so without considering the argument raised in *Yellow Cab* that affiliated corporations constitute a single entity for purposes of § 1. Moreover, defendants in *Crescent Amusement Co.* were clearly liable as well under § 2 of the Sherman Act for conspiracy to monopolize, which requires a finding of specific intent, and thus the § 1 holding was not essential to a finding of liability.

Shortly after deciding *Yellow Cab*, the Court again held that affiliated companies had conspired in violation of § 1 of the Sherman Act in *United States* v. *Griffith*, 334 U.S. 100 (1948), and *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. (1948). In *Griffith*, the Court assumed without discussion that the affiliated companies at issue were capable of conspiracy. The finding of a § 1 violation was unnecessary to the result reached because defendants clearly were also liable under § 2 for using their monopoly power in some towns to obtain advantages in buying films over their competitors in other towns where they were not monopolists. 334 U.S. at 106-08. In *Schine Theatres*, however, the Court considered and rejected the argument that affiliated defendants were incapable of conspiring under § 1, citing *Yellow Cab*, 334 U.S. at 116. However, once again, the § holding was unnecessary as defendants were clearly liable for conspiring with nonaffiliates under § 1 and for monopolizing under § 2. *See* Willis & Pitofsky, *supra* note 3, at 43-45.

(CCM) and five affiliated corporations controlled by Markin which operated fifty-three percent of the licensed taxicabs in Chicago, one hundred percent of the licensed cabs in Pittsburgh, fifty-eight percent of those in Minneapolis, and fifteen percent of those in New York City.[23] Several of the corporations grew out of mergers with previously independent competitors. The government alleged that Markin, CCM and the affiliated operating companies had "engaged in a combination and conspiracy to restrain [trade] and to monopolize interstate trade and commerce (1) in the sale of motor vehicles for use as taxicabs . . . in Chicago, Pittsburgh, New York City, and Minneapolis, and (2) in the business of furnishing cab services for hire in Chicago and vicinity."[24] The district court dismissed the complaint for failure to state a claim.

The Supreme Court reversed, holding that the facts alleged supported a charge of conspiracy under section 1. The Court stated:

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. *Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.* Similary, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. *The corporate interrelationships of the conspiractors, in other words, are not determina-*

[23] 332 U.S. at 221.

[24] *Id.* at 220.

tive of the appliability of the Sherman Act. That statute is aimed at substance rather than form.[25]

While the italicized language asserts that the fact of affiliation in a parent-subsidiary context will not immunize defendants from section 1 liability where a restraint of trade has occurred, some commentators have argued that other language in the opinion suggests that the Court did not intend to go that far.[26] They point out that the Court emphasized that the complaint charged that the restraint of trade "was the primary object of the combination."[27] In other words, the subsidiaries had not been formed to carry out the business of the parent but rather were corporations of prior disparate ownership that were combined to effect a restraint of trade. The theory of the complaint was that defendants' "'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'"[28] When this language is emphasized, the opinion stands for the proposition that a series of acquisitions, if they result in an unreasonable restraint of trade, may constitute a violation of section 1 and, if monopoly power is achieved, of section 2 as well. This is hardly a startling or disputable propostion and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to

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[25] *Id.* at 227 (citing *Appalachian Coals, Inc.* v. *United States*, 228 U.S. 344, 360-61, 376-77 (1933)) (emphasis added).

[26] *E.g.*, Kempf, *supra* note 3, at 175; Willis & Pitofsky, *supra* note 3, at 39; *Intra-Enterprise Conspiracy*, *supra* note 3, at 719.

[27] 332 U.S. at 227.

[28] *Id.* at 227-28. Each acquisition of necessity involved a contract, and the separate contracts, when aggregated, could be attached as a § 1 violation.

section 1.[29]

[29] It has also been suggested that "the lack of common ownership" undercuts any implication of a broad theory of intra-enterprise conspiracy in *Yellow Cab*. *Intra-Enterprise Conspiracy*, *supra* note 3, at 720. *See also* Kempf, *supra* note 3, at 175. Both commentators contend that evidence that common ownership dipped as low as 18 percent indicates that in fact the combination was among independent competitors. This reasoning, however, ignores the district court's reading of the complaint as one alleging common control. *United States* v. *Yellow Cab Co.*, 69 F.Supp. 170, 172 (N.D. Ill. 1946). Moreover, the Supreme Court in no way intimated that the degree of ownership influenced its decision one way or the other.

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948), has also been cited as supporting the proposition that *Yellow Cab* should be viewed as a § 2, not a § 1, case. Stengel, *supra* note 3, at 12; Willis & Pitofsky, *supra* note 3, at 40. At issue in *Columbia Steel* was the legality of the proposed acquisition of a west coast steel fabricator, Consolidated, by United States Steel through its wholly owned subsidiary, which the government sought to prevent on the ground that the vertical integration would eliminate Consolidated as a purchaser of raw materials. 334 U.S. at 507. The government urged that the vertical acquisition was a per se violation of § 1, relying on *Yellow Cab*. *Id.* at 521.

The Supreme Court rejected that contention, stating that in the *Yellow Cab* complaint "the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities...." *Id.* at 522. Willis and Pitofsky argue that this language indicates that *Yellow Cab* merely holds that "business practices, otherwise lawful, may violate the antitrust laws when undertaken for the purpose of monopolizing." Willis & Pitofsky, *supra* note 3, at 40. *See also* Stengel, *supra* note 3, at 12.

In fact, however, the *Columbia Steel* language on which Willis and Pitofsky rely is not inconsistent with the view that *Yellow Cab* also involved a finding of a § 1 violation. First, in *Columbia Steel* the Court said "combined and conspired," which plainly does not

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In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*,[30] the Supreme Court, however, did not interpret *Yellow Cab* in so narrow a fashion. Instead, without analysis, the Court reiterated the broad language of the opinion in rejecting defendants' contention that they were incapable of conspiring because of their affiliation. At issue in *Kiefer-Stewart* was a joint refusal by two wholly owned subsidiaries of the Seagram corporate family, Seagram and Calvert, to sell to plaintiff, a wholesale liquor dealer, who would not observe the maximum prices imposed by the defendants. The Seventh Circuit held that an agreement among competitors to fix maximum resale prices for their products did not violate the Sherman Act.[31] In reversing the decision, Justice Black first held that a vertical agreement fixing *maximum* prices was per se unlawful[32] and then, citing *Yellow Cab*,

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imply that *Yellow Cab* was a unilateral § 2 monopolization case. Moreover, elsewhere in the opinion, the Court distinguished *Yellow Cab* on the ground that it had been decided on the basis of the pleadings and thus the government's allegation of unreasonable restraint of trade had been accepted as true for purposes of determining whether it had stated a claim. In contrast, in *Columbia Steel* the government had failed to demonstrate that any unreasonable restraint of trade had resulted. 334 U.S. at 524-27. Thus, *Columbia Steel* is consistent with the view that *Yellow Cab* involves a § 1 violation.

What *Columbia Steel* does indicate is that *Yellow Cab* stands for the proposition that a series of vertical acquisitions may well violate § 1 if an unreasonable restraint of trade results from the acquisitions, which, as we noted in the text above, is not the same as saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to § 1.

[30] 340 U.S. 211 (1951).

[31] 182 F.2d 228 (7th cir. 1950), *rev'd*, 340 U.S. 211 (1951).

[32] 340 U.S. at 213 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

rejected defendants' argument "that their status as 'mere instrumentalities of a single manufacturing-merchandising unit' [made] it impossible for them to have conspired in a manner forbidden by the Sherman Act."[33] Justice Black reasoned that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E.g. United States v. Yellow Cab . . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors.*"[34] Nowhere did the Court consider or articulate the policy justification for such a rule or explain why the rule should have special applicability to commonly owned corporations that hold themselves out as competitors.

As in the case of *Yellow Cab*, it has been suggested that the intracorporate conspiracy holding was unnecessary under the facts presented.[35] The argument is that apart from the joint refusal of the two subsidiaries to sell to plaintiff, the evidence clearly established vertical price-fixing by each seller with its own wholesalers.[36] However, this fact alone would not have provided a sufficient basis for finding a section 1 violation. When *Kiefer-Stewart* was before the Court, neither *United States* v. *Parke, Davis & Co.*[37] nor *Albrecht* v. *Herald Co.*[38] had been decided. Thus, there was not yet support for the proposition that plaintiff could allege a combination between himself and Seagram as of the day he unwillingly complied with the resale price agreement,[39] or

[33] *Id.* at 215.

[34] *Id.* (emphasis added).

[35] Willis & Pitofsky, *supra* note 3, at 45.

[36] 340 U.S. at 213.

[37] 362 U.S. (1960).

[38] 390 U.S. 145 (1968).

[39] "Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he

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an unlawful combination among Seagram and its other wholesale customers[40] to require plaintiff to adhere to resale prices. Moreover, there is no evidence in the *Kiefer-Stewart* opinion that plaintiff had in fact ever agreed to the maximum resale prices sought by its supplier, Calvert.[41] Nor is there any evidence of combination among the other wholesalers to cooperate in enforcing the maximum resale prices. In sum, while it has been argued that the intracorporate conspiracy allegation was unnecessary to the result reached in *Kiefer-Stewart*, neither the facts of the case nor the state of the law at the time of the decision supports this view.[42]

Kiefer-Stewart was followed shortly by *Timken Roller Bearing Co.* v. *United States*,[43] where the Court once again repeated without analysis its view that common ownership or control was not conclusive for purposes of section 1. In *Timken*, an American company owning thirty percent of the stock of an English corporation and fifty percent of a French company,

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unwillingly complied with respondent's advertised price." *Id.* at 150 n.6; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 142. *See* note 59 *infra* & accompanying test.

[40] In *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), the Supreme Court held that Parke, Davis & Co. had created a combination to fix prices with its wholesalers and retailers because it had secured its retailers' acquiescence to the suggested prices by threats of termination and because its wholesalers had cooperated in terminating price-cutting retailers. *See also Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. at 141-42.

[41] 340 U.S. at 213.

[42] *See Intra-Enterprise Conspiracy*, *supra* note 3, at 724 n.45. *Kiefer-Stewart*, nevertheless, does not undermine our thesis that it is inappropriate to rely upon the intracorporate conspiracy doctrine when the action complained of does not rise to the level of a § 2 violation. *See* text accompanying note 224 *infra*.

[43] 341 U.S. 593 (1951).

all bearing substantially the same name, was held to have engaged in an illegal cartel with its affiliates. These companies participated in arrangements which, among other things, allocated trade territories among themselves, fixed prices on products sold in the territories assigned to the others, and protected each other's markets.[44] Writing for the majority, Justice Black restated unequivocally his earlier ruling in *Kiefer-Stewart* that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."[45] The only justification for this result is found in the concurring opinion of Justice Reed, who observed that:

> It may seem strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even a major interest, but any other conclusion would open wide the doors for violation of the Sherman Act at home and in foreign fields.[46]

Justice did not, however, cite any examples of how the doors for violation would be opened were the Court to have decided the case differently.

Justice Jackson, in dissent, took the majority to task, viewing its holding as invalidating any arrangement between subsidiary and parent to do that which would be lawful when undertaken by the parent alone. In Justice Jackson's view, this result placed "too much weight on labels."[47] He analyzed the economic reality of the arrangment and its effect on competition, finding that Timken had powerful rivals in foreign markets which prompted it to create "a British subsidiary to go after business best reach-

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[44] *Id.* at 596.

[45] *Id.* at 598.

[46] *Id.* at 601-02 (Reed, J., joined by Vinson, C.J., concurring).

[47] *Id.* at 607 (Jackson, J., dissenting).

able through such a concern and a French one to exploit French markets."[48] Thus, he concluded, "this decision will restrain more trade than it will make free."[49]

As in the case of *Yellow Cab,* the commentators have read *Timken* in a narrow fashion, suggesting that Justices Reed and Jackson's interpretations of the majority opinion are too broad, and noting that the facts of the case support a far narrower holding of liability under section 1.[50] Thus, it has been emphasized that the district court believed that the stock acquisitions by American Timken and Dewar and subsequent incorporation of British Timken were designed to continue a preexisting horizontal agreement between American Timken and British Timken's predecessors that had divided markets, fixed prices, and otherwise restrained competition between the parties.[51] Moreover, in concluding that American Timken was a separate corporate unit from British and French Timken for purposes of section 1, the district court relied on the fact that British Timken and French Timken had "retained their corporate independence and jealously guarded their interests" in dealing with American Timken.[52]Thus, arguably, there was effectively no parent-

[48] *Id.*

[49] *Id.* at 608.

[50] McQuade, *supra* note 3, at 211-12; Stengel, *supra* note 3, at 17; Willis & Pitofsky, *supra* note 3, at 46-48; *Intra-Enterprise Conspiracy, supra* note 3, at 722; Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?, 14* DUQ. L. REV. 63, 72-73 (1975).

[51] United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 311 (N.D. Ohio 1949).

[52] *Id. See Intra-Enterprise Conspiracy, supra* note 3, at 722. The author also suggests that the fact that the parties found it necessary to enter into written agreements to govern the competition among themselves indicates a lack of control. *Id.* at 738 n. 118.

subsidiary relationship since American Timken did not in fact control British Timken or French Timken.

The Court did not accept this limited view of its past pronouncements. On the contrary, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[53] Justice Black once again reiterated his freewheeling conception of the doctrine. The case was a treble damage action brought by several franchised dealers of defendant Midas, Incorporated. Other defendants included Midas' parent, International Parts Comporation, two other subsidiaries of International Parts, and six individuals who were officers or agents of the corporations.[54] The dealers alleged a conspiracy in restraint of trade among all of the defendants, challenging as illegal certain provisions in their franchise agreements that barred them from purchasing from other sources of supply, prevented them from selling outside their designated territory, tied the sale of mufflers to the sale of the other products in the Midas line, and required them to sell at fixed retail prices.[55]

In affirming summary judgment for defendants, the Seventh Circuit held that they were incapable of conspiring as a matter of law because "International Parts and the other defendants composed the *single business entity* by which

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[53] 392 U.S. 134 (1968).

[54] *Id.* at 135. Midas was a wholly owned subsidiary of International Parts. *Id.* at 136. It is not clear from either the Supreme Court or the Seventh Circuit decision the degree of ownership of International Parts in the other two subsidiaries. However, the affidavit submitted by the defendants in support of their summary judgment motion below stated "that all the related companies were part of a family corporate venture wholly owned by a father and son." *Antitrust Looking Glass, supra* note 3, at 184 (footnote omitted).

[55] 392 U.S. at 137.

the . . . [controlling] family sold exhaust parts."[56] Moreover, the court cited with approval the district court's finding that " '[t]here is no evidence . . . that these corporations competed with each other or acted in any manner other than as a single integrated business.' "[57]

Justice Black, for the Supreme Court majority, reversed, confining the entirety of his reasoning to a single sentence, which echoed the Seventh Circuit's analysis a quarter of a century before in *United States* v. *General Motors:* "But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."[58]

The Justice went on to note, however, that each petitioner could have charged "a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements . . . or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination' . . ."[59] Inclusion of these alternative holdings

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[56] 376 F.2d 692, 694 (7th Cir. 1967), *rev'd*, 392 U.S. 134 (1968) (emphasis added). It is interesting to note that the Seventh Circuit did not rely on *General Motors*, its own decision, but was reversed based on the reasoning in that opinion.

[57] *Id.* at 699.

[58] 392 U.S. at 141-42 (citing *Timken Co.* v. *United States*, 341 U.S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947)). *See* notes 17-21 *supra* and notes 192-206 *infra* & accompanying text for analysis of this standard.

[59] 392 U.S. at 142 (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *United States* v. *Arnold, Schwinn & Co.* 338 U.S. 365, 372 (1967); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1959)).

strongly suggests that the intracorporate conspiracy holding was unnecessary on the facts presented.

Significantly, the record revealed a dispute between the parties as to whether or not the parent and subsidiary sold competing lines of exhaust systems and held themselves out as competitors.[60] Justice Black's opinion does not address this question. If the parent and the subsidiary in fact sold competing products and held themselves out as competitors, the case might go no further than *Kiefer-Stewart*, where the Court had stressed that fact.[61] If, on the other hand, the parent and subsidiary did not sell competing products and did not hold themselves out as competitors, then the opinion stands for the limitless view that virtually any action which is ordinarily permissible is capable of being construed as an unlawful conspiracy if the company happens to have a parent, a subsidiary or a sister company that can be alleged to have acted in concert with it.[62]

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[60] *Antitrust Looking Glass*, *supra* note 3, at 184-85. The plaintiffs argued but did not substantiate that the defendant corporations competed with each other. 376 F.2d at 699.

[61] 340 U.S. at 215. *See* notes 30-42 *supra* & accompanying text.

[62] It has been suggested that the easy dispatch with which Justice Black dealt with defendants' single enterprise argument in *Perma Life* is difficult to reconcile with the Court's reasoning in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962), a case decided after *Kiefer-Stewart* but before *Perma Life*. *See, e.g., Intra-Enterprise Conspiracy*, *supra* note 3, at 729-30. In *Sunkist Growers*, the Court declined to find a conspiracy among Sunkist and its wholly owned subsidiaries, Exchange Orange and Exchange Lemon, both of which belonged to the Sunkist organization and which claimed exemption from the Sherman Act by reason of the agriculture cooperative exemption contained in § 6 of the Clayton Act and in the Capper-Volstead Act because, *inter alia*, there was "no indication that the use of separate corporations had economic significance in itself or that outsiders considered and

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One commentator has suggested that *United States* v. *Citizens & Southern National Bank*[63] undermines the reasoning in *Perma Life* and indicates that the Supreme Court might be amenable to the single enterprise defense where the parent controls the everyday activities of its subsidiary.[64] However, *Citizens & Southern* does not reach so far and does not make clear precisely what limits, if any, the Court reads into Justice Black's language in *Perma Life*.

At issue in *Citizens & Southern* was the relationship between defendant Citizens and its system of de facto branch banking which it had established to avoid a Georgia law that prohibited de jure branch banking. Citizens was instrumental in founding several banks, five percent of the shares of

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dealt with the three entities as independent organizations." 370 U.S. at 29.

The Court's concentration on substance and economic significance, rather than on the mere fact of separate incorporation, which it termed of de minimis importance, appears at odds with its approach in the intracorporate conspiracy cases. Moreover, the Court's reference to the fact that outsiders did not deal with the company as other than a single unit suggests that whether a company has held itself out as a competitor is an important factor in determining whether affiliated companies are two economic entities or one. Interestingly, Justice Black joined the majority opinion in the case.

However, in *Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), the Third Circuit opined that *Sunkist* "offers scant support for an attack on the intra-enterprise conspiracy doctrine." Because it reasoned that *Sunkist* had in fact held that "the policy behind the Capper-Volstead Act required that two affiliated subsidiaries of a fruit marketing organization be treated as exempt agricultural organizations." *Id.* at 33-34 n.49.

[63] 422 U.S. 86 (1975).

[64] *Intra-Enterprise Conspiracy*, *supra* note 3, at 741.

which it held with the rest placed in the hands of friendly parties. The five percent banks, using Citizens' logo on their buildings, papers, and letterhead, provided a full range of Citizens' services. Moreover, Citizens selected the principal executive officers of the five percent banks, oversaw selection of their directors, and appointed one of its own executives to serve as an "advisory director." Finally, Citizens supplied each five percent bank with a wealth of information on "every conceivable banking procedure and problem,"[65] including data suggesting interest rates and service charges. As a result, "in almost every respect save corporate form, each of the 5-percent banks was a *de facto* branch of [Citizens]."[66]

After Georgia amended its law to permit branch banking, Citizens applied to the Federal Deposit Insurance Corporation for permission to acquire the outstanding shares of the de facto banks to make them de jure branches. The FDIC approved five of six proposed acquisitions, but the Justice Department challenged them as violative of section 7 of the Clayton Act. In addition, the government claimed that the historic de facto branch relations between Citizens and its five percent banks constituted a tacit agreement to fix prices amounting to a per se violation of section 1 of the Sherman Act.[67]

In rejecting the price-fixing claim, the Supreme Court analyzed the evidence establishing an agreement and concluded that the district court had correctly held it insufficient to support a finding that the defendants had in fact conspired to fix prices:

> Were we dealing with independent competitors having no permissible reason for intimate and continuous

[65] 422 U.S. at 93.

[66] *Id.*

[67] *Id.* at 112.

> cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a conspiracy to affect prices. But, as we indicate below, the correspondent associate programs, as such, were permissible under the Sherman Act. In this unusual light, we cannot hold clearly erroneous the District Court's finding that the lack of significant price competition did not flow from a tacit agreement but instead was an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate programs.[68]

This passage has been cited as implying an acceptance by the Supreme Court of a "control theory" for determining when corporations should be treated as a single enterprise under section 1.[69] In fact, however, the Court did not go so far. The language simply states that while the evidence might have been sufficient to uphold a finding of conspiracy to fix prices between truly independent companies, it was insufficient where the companies had legitimate business reasons for meeting and consulting. This is not the same as holding that they are incapable of conspiring for purposes of section 1 because one controls the other. This language does suggest, however, that although commonly owned or controlled corporations can conspire, the courts will require greater evidence of actual contract, combination, or conspiracy than in section 1 cases involving completely independent companies that have no proper reason for meeting or consulting. This would, of course, be a significant holding in the intracorporate conspiracy context. Recently, several courts

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[68] *Id.* at 113-14.

[69] *Intra-Enterprise Conspiracy, supra* note 3, at 741-42.

have adopted this evidentiary approach, but without citing *Citizens & Southern*.[70]

It is also of interest that in *Citizens & Southern* the Supreme Court noted that "[t]his Court has held that even commonly owned firms *must* compete against each other, if they hold themselves out as distinct entities," citing *Yellow Cab, Kiefer-Stewart, Timken*, and *Perma Life*.[71] This may appear to be a slight mistatement of the law. *Kiefer-Stewart* did not hold that commonly owned firms—or independent ones, for that matter—must compete; rather, it held, as the Sherman Act mandates, that they could not conspire not to compete. However, assuming the Court meant to restate the language of *Keifer-Stewart*, this statement arguably means that the Court would narrowly interpret the intracorporate conspiracy doctrine to apply only where commonly owned firms have held themselves out as competitors. But if the Court in *Citizens & Southern* meant to confine the intracorporate conspiracy doc-

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[70] In William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917 (9th Cir. 1981), the court stated:

> We express no views about the existence of . . . [an intracorporate] conspiracy in this case. We note, however, that although a conspiracy may be inferred from circumstantial evidence, Inglis must show an understanding between the alleged coconspirators with the specific intent of each to restrain trade or monopolize the market. *With [sic] appropriate regard for this requirement, the typically close relationship between parent and subsidiary could too easily give rise to inferences of conspiratorial activity. Antitrust laws should not deter legitimate consultation between a holding company and its subsidiary with regard to financial planning or the establishment of lawful economic goals to be pursued by the subsidiary.*

Id. at 959 (emphasis added). *See also Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128, 131 (N.D. Cal. 1981); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *Sulmeyer* v. *Seven-Up Co.*, 411 F.Supp. 635, 641 (S.D.N.Y. 1976).

[71] 422 U.S. at 116-17 (emphasis added).

trine to firms that competed, it is curious indeed that it did not reject the section 1 claim on the ground that the de facto branch banks had not held themselves out as competitors. *Citizens & Southern* simply does not clarify what limits, if any, there are to the reach of *Perma Life*.[72]

II. Intracorporate Conspiracy Doctrine in the Circuit Courts of Appeals and District Courts

As the above analysis indicates, the Supreme Court opinions in the intra-enterprise area share common characteristics—broad rulings that could potentially jeopardize normal parent-subsidiary relations, a failure to articulate the policy basis or justifications for such holdings, and facts that would have justified a holding of liability on other grounds (with the exception of *Kiefer-Stewart*). It is thus not surprising that the lower courts have attempted to formulate some alternative rationale or standard for limiting the potential sweep of the Court's decisions. However, the same broad language that impelled some courts to attempt to constrict the doctrine convinced others that there was no choice but to permit claims of intracorporate conspiracy to proceed to trial.

At present, the First, Third, and Fifth Circuits have held as a matter of law that a parent and its wholly owned subsidiary, due to separate incorporation, provide the plurality of actors

[72] In rejecting the government's claim under § 7 of the Clayton Act, the Court noted that there had never been any "real competition" between the de facto branches and Citizens as a result of the de facto branch bank relationship, and therefore the merger would not be likely to substantially lessen competition. *Id.* at 121. Indeed, the result of the de facto branch bank system was "an almost total absence of competition" between Citizens and the five percent banks and among the banks themselves. Robinson, *Recent Antitrust Developments: 1975, 76* COLUM. L. REV. 191, 227 (1976). The Supreme Court upheld the de facto branch banking arrangement under § 1 as reasonable since its "whole purpose and effect [was] to *defeat* [the] restraint of trade" imposed by Georgia's branch banking law. 422 U.S. at 118 (emphasis in original).

required by section 1.[73] In contrast, the Seventh, Eighth, and Ninth Circuits have held that the capacity of separately incorporated but related corporations to conspire cannot be determined solely from the fact of separate incorporation but must be decided after analyzing all the facts and circumstances regarding the corporations' interrelations.[74] While the Second Circuit has not squarely decided the issue, it is at

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[73] *First Circuit:* George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). *But cf. White* v. *Hearst Corp.*, No. 80-891-Z, at 4-5 (D. Mass. Apr. 9, 1981) (where the court held on all the facts and circumstances that defendants were a single enterprise incapable of conspiring under § 1); *Third Circuit: Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Bravman* v. *Bassett Furniture Indus., Inc.*, 552 F.2d 90, 101 n.32 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); *Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72, 81 n.16 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Cromar Co.* v. *Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975). *But see Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 f.2d 1093, 1094-95 n.1 (3d Cir. 1972); *Fifth Circuit: H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978); *Battle* v. *Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *see* notes 77-111 *infra* & accompanying text.

[74] *Seventh Circuit: Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). *But see United States* v. *New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79, 87-88 (7th Cir. 1949); *United States* v. *General Motors Corp.*, 121 F.2d 376, 404 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); *cf. Tamaron Distrib. Corp.* v. *Weiner*, 418 F.2d 137, 139 (7th Cir. 1969) (allegations of conspiracy between manufacturers and noncompeting agent held sufficient to state a § 1 claim); *Eighth Circuit: Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 587-90 (8th Cir. 1981); *cf.* TV Signal Co. v. A.T.&T., 462 F.2d 1256, 1260 (8th Cir. 1972) (holding that whether intracorporate conspiracy doctrine should be limited should be decided in light of actual facts and not determined on the pleadings). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323-29 (8th Cir. 1973); *Ninth Circuit: William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 652 F.2d 917, 958 (9th Cir. 1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Harvey* v.

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least arguable that the court has construed *Kiefer-Stewart* as limiting liability for intracorporate conspiracy to cases where two corporations have held themselves out as competitors.[75] Similarly, although the Fourth Circuit on two occasions has affirmed judgments for defendants which were rendered below on the basis that a parent and its subsidiary were incapable of conspiring, it has done so without expressly considering the intracorporate conspiracy doctrine.[76] The Sixth and Tenth Circuits, and the Court of Appeals for the District of Columbia have not addressed the issue.

In this section, we consider the various approaches that have been adopted for dealing with the intracorporate conspiracy issue and analyze the advantages and disadvantages of each.

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Fearless Farris Wholesale, Inc., 589 F.2d 451, 455-57 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 801-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *see* notes 156-89 *infra* & accompanying text; *cf. Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 81-82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (manufacturer and its distributor, whether a subsidiary or independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott per se rule). *But see Dobbins* v. *Kawasaki Motor Corp.*, [1974-1] Trade Cas. ¶ 75,100 (D. Ore.).

[75] *Triebwasser & Katz* v. *A.T.&T.*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976); *International Rys.* v. *United Brands Co.*, 532 F.2d 231, 240 n.19 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). *See Beckman* v. *Walter Kidde & Co.*, 316 F.Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S 922 (1972); text accompanying notes 136-42 *infra*; *cf. Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683, 687 (2d Cir. 1963) (holding that parent's grant of free advertising to subsidiary not sufficient to state a § 1 claim).

[76] *Call Carl, Inc.* v. *BP Oil Corp.*, 554 F.2d 623, 628 n.4 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F.2d 797 (4th Cir. 1951).

A. Perma Life Means What It Says

The First, Third, and Fifth Circuits have embraced the concept of intracorporate conspiracy and have generally refused to permit separately incorporated but related companies to defend on the ground that they are a single enterprise. These courts read the broad language of the Supreme Court's decisions literally and conclude that there is no room to maneuver.

George R Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*[77] is illustrative. Plaintiff, a manufacturer and merchandiser of swimming pool recirculation systems, brought a private antitrust action against a competing manufacturer and merchandiser of such systems, which consisted of three affiliated corporations.[78] Plaintiff alleged that defendants had used improper methods in an attempt to influence architects and engineers to use defendants' proprietary specifications before accepting competitive bids on projects and had engaged in other anticompetitive actions with the object of excluding plaintiff and other competitors, all in violation of sections 1 and 2 of the Sherman Act.[79]

The First Circuit, in affirming judgment for defendants on other grounds, raised sua sponte the issue of whether defendants were capable of conspiring. Although the court noted that the doctrine regarding "thin conspiracies" among affiliated corporations was not free from criticism, it concluded that it was alive and well, citing *Yellow Cab*, *Kiefer-Stewart*, *Timken Roller Bearing*, and *Perma Life*. The court

[77] 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

[78] The defendant companies were all owned by one Baker who was a corporate officer and chairman of the board of each, although he was not actively involved in management of two of the three companies. However, the president of one of the three companies served on the board of another and the companies held joint sales meetings. *Id.* at 549 n.1, 557.

[79] *Id.* at 549-50.

stated: "We are satisfied that under the *Yellow Cab* doctrine, the evidence is sufficient to portray a plurality of actors concerting their efforts toward a common end."[80]

Interestingly, the court analyzed the facts regarding the relationships between the defendant corporations not for purposes of determining whether they were one economic unit, but rather for purposes of establishing the existence of joint action by them. It concluded that the companies were not competitors but rather vertically integrated affiliates.[81] The First Circuit deemed significant the mere fact of integration as evidence of conspiracy or agreement under section 1.[82] In contrast, other courts have concluded that the fact of integration establishes that affiliates are a single enterprise incapable of conspiring.[83]

The Third Circuit has similarly concluded that there is no room for separately incorporated affiliates to claim that they are a single enterprise. In *Cromar Co.* v. *Nuclear Materials & Equipment Corp.*,[84] the Third Circuit reversed a district court decision that dismissed plaintiff's antitrust action, holding that plaintiff Cromar had stated a section 1 claim against defendant Atlantic Richfield Company (ARCO) and its wholly owned subsidiary, Nuclear Materials and Equipment Corporation (NUMEC).[85] The suit arose after NUMEC and ARCO terminated an agreement with Cromar for its alleged

[80] *Id.* at 557

[81] *Id.*

[82] *See id.*

[83] See text accompanying notes 156-89 *infra*.

[84] 543 F.2d 501 (3d Cir. 1976).

[85] Plaintiff was a manufacturer of prefinished wood parquet flooring and entered into a contract with NUMEC, guaranteed by ARCO, to convert lumber ito finished wood-plastic fillets. NUMEC would treat the fillets with radiation, and Cromar then would assemble them into parquet panels. ARCO marketed this

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failure to meet the requirements of a contract. The complaint alleged that NUMEC and ARCO had combined and conspired to force plaintiff out of business in violation of sections 1 and 2 of the Sherman Act. The district court granted defendants' motion for a directed verdict on plaintiff's section 1 claim on the ground that plaintiff had failed to introduce evidence of anticompetitive intent necessary to convert a mere breach of contract into an antitrust violation.[86]

The Third Circuit reversed and held that the district court had improperly excluded evidence of defendants' intent. In addition, it expressly rejected defendants' contention that they were legally incapable of conspiring, holding that the Supreme Court decisions in this area are not confined to affiliated corporations that hold themselves out as competitors. The court reasoned that *Perma Life* had dispelled any notion that *Kiefer-Stewart* had imposed any qualification upon the antitrust liability of parents and subsidiaries.[87] The court held that the "absence of any appearance of competition between the defendants [is] irrelevant to their potential Sherman Act liability."[88]

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wood-plastic composite flooring under its own brand name. *Id.* at 502-03.

[86] The district court also granted defendants summary judgment on the § 2 claim on the ground that plaintiff Cromar lacked standing. The Third Circuit reversed and held that Cromar did have standing under § 2. *Id.* at 504-10.

[87] *Id.* at 512.

[88] *Id.* at 511. The Court rejected as dictum Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972), upon which the defendants had relied. 543 F.2d at 512 n.18. There, the Third Circuit had stated in a footnote that there was "ample authority" for the proposition that defendant manufacturer and subsidiary were incapable of conspiring as a matter of law because they had never held themselves out as comptetitors. 461 F.2d at 1094-95 n.1.

The Third Circuit, however, might be sympathetic to the contention that where the concerted action relates solely to the internal management of a single firm and does not restrain external competition, there should not be any liability for conspiracy. In *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemcial Corp.*,[89] the court suggested in a footnote that if limitations on the intracorporate conspiracy doctrine are necessary, they should be based on the notion that the agreement at issue restrained no outsider's trade, rather than on the concept that affiliated corporations are incapable of conspiring.[90]

The law in the Fifth Circuit similarly appears to be that *Perma Life* means what it says. In *Battle* v. *Liberty National Life Insurance Co.*,[91] plaintiffs were funeral home companies and their directors who contended that arrangements between defendants Liberty National Life Insurance Company and its wholly owned subsidiary, Brown-Service Funeral Home Company, violated sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act[92] in that the

[89] 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

[90] *Id.* at 33-34 n.49. Even were the Third Circuit ultimately to adopt this standard, it is not a completely satisfactory distinction in practice. *See* text accompanying notes 124-34 *infra*.

[91] 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

[92] *Id.* at 42. Defendant Liberty National issued several types of insurance, including burial insurance; Brown-Service contracted with Liberty to provide merchandise and services required by the burial insurance policies. Brown-Service in turn contracted with numerous independent funeral homes and directors in Alabama to perform Brown-Service's obligations under its contract with Liberty National. Those independents who contracted with Brown-Service were known as authorized homes, and the services to be rendered under Liberty National burial insurance policies differed depending on whether the insured used an authorized home or an unauthorized home. *Id.* at 43.

arrangements at issue coerced policyholders into dealing with Brown-Service authorized homes.[93]

The district court granted defendants' motion to dismiss on grounds unrelated to the intracorporate conspiracy doctrine.[94] The Fifth Circuit reversed and, in doing so, rejected the argument raised on appeal that the defendants were, as a matter of law, incapable of conspiring.

> Defendants argue, however, that because Liberty National and Brown-Service are one organization or business unit and not competitors, they are unable to form a combination or conspiracy within the meaning of § 1. We cannot agree.
>
> Even though Liberty National and Brown-Service are not competitors, because Liberty National is in the insurance business while Brown-Service provides funeral services and merchandise, the alleged facts tend to establish that they are operationally two separate organizations entirely capable of combining or conspiring to restrain trade. That the defendants do not compete with each other in no way precludes them from combining or conspiring to suppress competition, the ultimate result of which would inure to their mutual benefit. While the existence of competition between two organizations would tend to establish their separateness and thus fulfill the requirement that it takes more than one party to create a combination or conspiracy, *the absence of such*

[93] *Id.* at 44-45.

[94] The district court held that (a) plaintiffs lacked standing; (b) a prior consent decree between Liberty National and the government immunized defendants' conduct from liability; and (c) the McCarran-Ferguson Act exempted Liberty National from liability under the antitrust laws. *Id.* at 43-44.

competition does not preclude the existence of two separate organizations.[95]

There is a certain ambiguity in the court's concept of "separateness." The court states that evidence that a parent and its affiliate do not compete may indicate that they are "operationally two *separate* organizations."[96] On the other hand, existence of competition between two organizations would tend to establish their "separateness" as well. It is difficult to understand what, if anything, would establish that a parent and its affiliate comprise a single business unit. Is the court saying anything different than the assertion that separate incorporation is enough to establish the plurality of actors required under section 1?

Whatever ambiguity there may have been was clarified in the court's subsequent decision in *H & B Equipment Co.* v. *International Harvester Co.*,[97] where, in affirming a directed verdict for defendants on other grounds in a sections 1 and 2 action brought by a terminated dealer of International Harvester, the court stated: "The parent's choice of form is important. Having availed itself of separate incorporation for Harco, International Harvester marked it off as a distinct entity, and the antitrust laws treat it as such."[98]

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[95] *Id.* at 44 (emphasis added). It is of interest to note that *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert denied*, 408 U.S. 922 (1972), cited by the Fifth Circuit to support its reasoning, in fact reaches the directly opposite conclusion of the Fifth Circuit. The Court in *Beckman* held that because the parent and subsidiary did not compete, they were not capable of conspiring under § 1. *See* text accompanying notes 136-42 *infra*.

[96] 493 F.2d at 44 (emphasis added).

[97] 577 F.2d 239 (5th Cir. 1978).

[98] *Id.* at 245.

The fundamental problem with the literal approach of the First, Third, and Fifth Circuits to the intracorporate conspiracy doctrine is that it reaches too far and renders illegal a host of legitimate parent-subsidiary or corporate affiliate arrangements and agreements. For example, if a parent directed its wholly owned distribution subsidiary to sell the parent's products at a certain price, the parent and subsidiary would be liable for price-fixing. If a parent controlled two subsidiaries which sold the same product, assigned them territories and directed that they not compete against each other, they could be liable for horizontal conspiracy to restrain trade. Similarly, if affiliated companies follow parallel pricing or marketing policies, they conceivably could be sued on a theory of conscious parallel action with plus factors.[99] A manufacturer who orders a wholly owned subsidiary to cut back or shut down its production or to refuse to deal with certain customers could incur treble damage liability. A foreign corporation that operated in the United States through a wholly owned subsidiary would be at risk under the Sherman Act if it dictated its subsidiary's prices or ordered the subsidiary to refuse to deal with a third party. In short, there are numerous everyday actions in which related companies engage that would become potential sources of violation. The intracorporate conspiracy doctrine has been repeatedly criticized on this ground.[100] It is no

[99] *See, e.g.*, *Venzie Corp.* v. *United States Mineral Prods., Co.*, 521 F.2d 1309 (3d Cir. 1975). "Plus factors" refer to the additional elements that must be demonstrated before a factfinder may permissibly infer a conspiracy from evidence of parallel business conduct. These include, *inter alia*, (1) a finding that the business conduct at issue is not in the economic interests of the defendants, and (2) additional evidence of improper motivation in entering the agreement. *Id.* at 1314.

[100] *See Misadventures in Antitrust*, *supra* note 3, at 121-22; *Contract, Combination or Conspiracy*, *supra* note 3, at 47; McQuade, *supra* note 3, at 216; Willis & Pitofsky, *supra* note 3, at 21; *Intra-Enterprise Conspiracy*, *supra* note 3, at 727.

answer to say that the doctrine never contemplated any such chamber of horrors. If so, why the overbreadth and absolute character of its formulation? And if its reach does not embrace these hypothetical situations, at what point is the line drawn?

Form is exalted over substance where the parent that wholly owns or controls the subsidiary could, if it desired, reorganize its subsidiaries into divisions.[101] The courts are uniform that a corporation and its divisions cannot conspire for purposes of section 1 of the Sherman Act.[102] Thus, any threat that the doctrine of intracorporate conspiracy poses can easily be avoided by converting subsidiaries into corporate divisions.[103] Indeed, this is precisely what

[101] While it might be argued that § 1 itself exalts form over substance, we do not believe that this criticism invalidates our point. For further discussion of this issue, see text accompanying notes 235-41 *infra*.

[102] *See, e.g. H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Poller* v. *CBS*, 284 F.2d 599 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962); *J.W.T., Inc.* v. *Joseph E. Seagram & Sons, Inc.*, 347 F. Supp. 965 (N.D. Ill. 1972); *Allen Ready Mix Concrete Co.* v. *John A. Denie's Sons Co.*, [1972] Trade Cas. ¶ 73,955 (W.D. Tenn.); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 323 F. Supp. 1145 (E.D. Pa. 1971), *aff'd per curiam*, 461 F.2d 1093 (3d Cir. 1972); *Kemwel Automotive Corp.* v. *Ford Motor Co.*, [1966] Trade Cas. ¶ 71,882 (S.D.N.Y.); *Deterjet Corp.* v. *United Aircraft Corp.*, 211 F. Supp. 348 (D. Del. 1962); *Johnny Maddox Motor Co.* v. *Ford Motor Co.*, 202 F. Supp. 103 (W.D. Tex. 1960).

[103] Section 7 of the Clayton Act, 15 U.S.C. § 18 (Supp. IV 1980), expressly provides that nothing contained therein shall

> prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate

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Seagram did after losing before the Supreme Court; it deincorporated its wholly owned subsidiaries and organized them as divisions.[104] Divisions of corporations often operate with as much or more autonomy as corporate subsidiaries. Conversely, a corporate subsidiary may be as much an integral part of a parent as a division.

The principal reason cited by the courts in holding that a corporation is legally incapable of conspiring with its divisions is that such a rule would be unworkable as a matter of business practice. For example, in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*,[105] the Ninth Circuit, in reversing the district court's ruling that divisions of the same corporation were capable of conspiring, reasoned that if such a rule were accepted, it could see "no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not."[106] It noted that no corporation of any size can operate without divisions and that sound management demands extensive delegation of authority within an organization. Moreover, it is inevitable that divisions, even partially autonomous ones, cannot operate completely independently of each other and must

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> lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Since it is lawful under § 7 to form a subsidiary to conduct a corporation's business, it would follow that it is lawful to merge the subsidiary into the corporation as a division.

[104] *See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[105] 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[106] *Id.* at 83.

consult and agree on policies.[107] To adopt a rule that a corporation is capable of conspiring with its divisions would in effect hand plaintiffs "on a silver platter, an automatically self-proving conspiracy."[108] This logic applies with equal force in the case of parent-subsidiary relations.

The law is similarly uniform that a corporation cannot conspire with its officers or directors under section 1 because a corporation can act only through its agents.[109] Thus, the court concluded in *Nelson Radio & Supply Co.* v. *Motorola, Inc.*[110] that to allege a conspiracy between a corporation and its officers is in effect to accuse the corporation of conspiring with itself.[111] Similarly, when a parent acts through the officers of its wholly owned subsidiary, it would also appear to be in effect conspiring with itself.

None of the cases that have concluded that *Perma Life* means what it says have (a) articulated any policy reasons for employing the rule; (b) considered whether trade or commerce would in fact be restrained absent the rule; or (c) addressed the fundamental policy implications of this approach.

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[107] *Id.* at 83-84.

[108] *Id.* at 84.

[109] *See, e.g., H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 287 (5th cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646, 654 n.7 (5th Cir. 1977); *Morton Bldgs. of Neb., Inc.* v. *Morton Bldgs., Inc.*, 531 F.2d 910, 917 (8th Cir. 1976); *Walker* v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 617 (3d Cir. 1960); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[110] 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[111] *Id.* at 914.

B. Separate Incorporation as the Beginning, Not the End, of Inquiry

Numerous courts have sought to avoid the limitless impact of the literal approach by devising alternative tests to be applied in determining whether related corporations are distinct economic units. The Seventh, Eighth, and Ninth Circuits, as well as many district courts, have concluded that separately incorporated affiliates may be viewed as a single enterprise in some circumstances. The fact of separate incorporation, to these courts, marks the beginning of the inquiry, not its end. In this section, we examine the various tests that have developed and conclude that although several go a long way toward mitigating the harshness of the doctrine, none is satisfactory.

1. The Sole Decisionmaker Rule

Several courts have held that separate corporations were incapable of conspiring because they were owned and controlled by one person who made decisions as to both.[112] One of the earliest attempts to fashion a more coherent theory of intracorporate conspiracy relied on this approach. In *Windsor Theatre Co.* v. *Walbrook Amusement Co.*,[113] defendants were two separately incorporated movie theatres, which were owned by one Goldberg who also served as chief executive of each. Plaintiff, a rival movie theatre, alleged that defendants had conspired with seven major motion picture distributors (not named as defendants) to refuse to license motion pictures to plaintiff.

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[112] *Las Vegas Drive-In Theatre, Inc.* v. *National Gen. Theatres, Inc.* [1979-2] Trade Cas. ¶ 62,895 (D. Nev.); *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346, 1358-59 (N.D. Cal. 1974), *aff'd in relevant part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951).

[113] 94 F. Supp. 388 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951).

While the court noted that defendant theatres did not compete with each other, it rested its decision that there could be no conspiracy between the two defendants on other grounds. The court held that there was in fact no conspiracy because the activities of both defendant corporations were directed by Goldberg who was the president and chief executive officer of each.[114] In short, Goldberg was incapable of conspiring with himself.

The court did not say that two affiliated corporate defendants could never conspire with each other. Conceivably, they might be held liable for conspiracy if the concerted action was agreed to by different individuals at the two corporations even though only one individual owned both. The "sole decisionmaker" rule hardly makes sense in other than the most narrow circumstance, yet this clearly appears to be what the court had in mind, for it distinguished *United States* v. *General Motors Corp.*,[115] on the ground that there, the corporation had two or more agents or officers.[116]

More recently, the Ninth Circuit relied on the "sole decisionmaker" rule in affirming summary judgment for defendants in *Harvey* v. *Fearless Farris Wholesale, Inc.*[117] Plaintiffs, partners in a retail gasoline service station, sued Fearless Farris Wholesale, Inc. and five separately incorporated gasoline service stations, for violating section 1 by cutting off plaintiffs' supply of gasoline. Lind was the sole owner of Fearless Farris Wholesale and each of the five gasoline service station defendants.

The Ninth Circuit noted that previously it had "taken the position that the mere formality of separate incorporation is

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[114] *Id.* at 396.

[115] 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

[116] 94 F. Supp. at 396.

[117] 589 F.2d 451 (9th Cir. 1979).

not, without more, sufficient to provide the capability for conspiracy."[118] The court declined, however, to determine what additional factors are necessary before affiliated corporations will be deemed capable of conspiring,[119] because the sole owner was the sole decisionmaker in the action of which plaintiff complained and thus no conspiracy had occurred:

> [E]ven if the defendant corporations, acting through their officers or agents, were deemed theoretically capable of conspiring, *here in fact no conspiracy, no meeting of two or more minds, occurred*. . . . [P]laintiffs produced no probative evidence that anyone other than Farris Lind—sole stockholder, President and Chairman of the Board of [defendants]—made the decision to refuse to deal with plaintiffs. Mr. Olson's subsequent implementation of this decision does not make him a participant in a conspiracy.[120]

The court, in confining its holding to the facts presented, refused to hold as a matter of law that a finding of conspira-

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[118] *Id.* at 456; *See Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 802-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[119] In *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980), the Ninth Circuit considered a number of factors in holding that corporations owned by a single person, who did not participate in the decision at issue, were incapable of conspiring with each other. *Id.* at 617-19. The court, however, did not clarify what factors were needed as a matter of law to mandate such a result. *See* text accompanying notes 168-80 *infra*.

[120] 589 F.2d at 457 (emphasis added).

cy would be precluded where, for example, the sole owner was not the sole decisionmaker.[121]

Only one reported decision has gone so far as to hold that as a matter of law corporations owned and controlled by a single person cannot conspire with one another. In *Rayco Manufacturing Co.* v. *Dunn*,[122] the court granted plaintiffs, affiliated corporations, summary judgment on defendant's section 1 Sherman Act counterclaim because it appeared to the court that "the subsidiary corporations and [their owner] were one and the same person."[123]

The "sole decisionmaker" doctrine makes technical sense and would alleviate the problems faced where an officer or other decisionmaker holds positions in and makes decisions jointly for affiliated corporations. The doctrine does not, however, go very far toward solving the problems raised by the intracorporate conspiracy doctrine. It does not explain why from an antitrust point of view two closely related corporations should be capable of conspiring where the sole owner was not responsible for the decision that is challenged. In other words, why should liability depend on whether one or two individuals made the decision at issue? The sole decisionmaker rule provides little solace in the more common situations where affiliates are not owned by one person, where the decisionmaker does not serve in a dual capacity, or where there are multiple decisionmakers who serve in dual capacities.

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[121] *Id.* at 455 n.8, 458. The district court in *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), *aff'd in relevant part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), similarly rested its decision on the fact that the sole owner was also the sole decisionmaker in the action complained of. *Id.* at 1358-59.

[122] 234 F. Supp. 593 (N.D. Ill. 1964).

[123] *Id.* at 598.

2. Concerted Action That Restrains No Outsider's Trade

Another approach that courts have taken in attempting to limit the reach of the intracorporate conspiracy doctrine is to distinguish between concerted action aimed at outsiders, which would be actionable, and concerted action aimed only at subsidiaries or affiliates themselves, which would not.[124]

Support for this approach is found in the Report of the Attorney General's National Committee to Study the Antitrust Laws, which interpreted the relevant Supreme Court decisions to mean that "[w]here . . . concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated."[125] Based on this interpretation of the Supreme Court's opinions, most of the members of the Committee went on to "disapprove any application of this doctrine to joint action between members of a corporate family not intended to or resulting in coercive undue restraint on their customers or competitors."[126]

The Attorney General's Report further noted that the Department of Justice had "never brought an action against

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[124] *Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981); *aff'd*, 1982-2 Trade Cas. *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 859-60 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *REA Express, Inc.* v. *Alabama Great S.R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *In re* REA Express, Inc., 412 F. Supp. 1239, 1255-57 (E.D. Pa. 1976); *Chastain* v. *A.T. & T.*, 401 F. Supp. 151, 159-60 (D.D.C. 1975); *Williams* v. *Pennsylvania Co.* (*In re* Penn Central Sec. Litigation), 367 F. Supp. 1158, 1166-67 (E.D. Pa. 1973).

[125] Report of the Attorney General's National Committee to Study the Antitrust Laws, 34 (1955).

[126] *Id.* at 35. Professor Sullivan draws the same distinction in his treatise. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977).

a parent and its subsidiary corporations . . . charging a conspiracy solely in restraint of the trade of the affiliated defendants,"[127] a policy which appears to have continued to date.[128]

This policy has been applied effectively in several cases in which there seemed little doubt that third party interests were not affected, and where third parties made no such contention. In two such cases, REA Express, after it was purchased by new owners, sued its former owners, numerous railroads which had jointly owned the company. REA alleged that by incurring nonnegotiable debt on its behalf, the railroads conspired in restraint of trade because the railroads agreed with REA and each other on the interest rates, and engaged in other practices in operating REA that restrained trade in violation of section 1.[129] In dismissing the antitrust

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[127] Report of the Attorney General's National Committee to Study the Antitrust Laws, *supra* note 125, at 34.

[128] *See* Willis & Pitofsky, *supra* note 3, at 20-21. Donald Turner, shortly after he took office as head of the Antitrust Division at the Justice Department in the 1960's, indicated that the Department of Justice would adhere to its apparent policy of not pressing the intracorporate doctrine to its maximum. Mr. Turner stated the Department's view on the intracorporate doctrine, as follows:

> We don't generally favor any bathtub conspiracy charge. In fact, it's not the happiest of legal doctrines in any case. But, as the law has developed in this area, it has been considered appropriate to apply the conspiracy doctrine to related companies whenever predatory or coercive conduct is directed against outsiders. . . . It hasn't been applied to internal decisions.

Id. at 21 (quoting BNA Daily Report for Executives A-2 (April 14, 1967)).

[129] *REA Express* v. *Alabama Great S. R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *In re* REA Express, Inc., 412 F. Supp. 1239, 1241-42 (E.D. Pa. 1976).

claims, the courts relied on the fact that the lawsuits had not been brought by third parties, but rather by a subsidiary against its parent, challenging agreements between them which did not affect third parties.[130]

This distinction, however, has not escaped criticism, not because it is wrong as far as it goes, but principally because it does not go far enough.[131] The fundamental problem with the standard is that the majority of intracorporate agreements are likely to have some effect on third parties.[132] For example, a parent's decision that its subsidiary should lower its prices to increase volume may well take business away from competitors who could claim that the pricing decision was aimed at outsiders and adversely affected them. A decision by a manufacturer that its subsidiary should cut distribution costs by withdrawing from a certain geographic area or refusing to sell to certain customers will obviously have an adverse effect on the subsidiaries' customers. More importantly, emphasis on the effect on third parties is misplaced because it ignores the fact that section 1 permits a variety of single firm behavior which may harm third parties. Moreover, such an approach misses the mark because the focus then is on the competitive impact of the agreement

[130] 427 F. Supp. at 1166; 412 F. Supp. at 1255-57. *See also Williams v. Pennsylvania Co. (In re* Penn Central Sec. Litigation), 367 F. Supp. 1158, 1166-67 (E.D. Pa. 1973) (dismissal of a shareholder's attack on the parent corporation's policies which had the effect of preventing its three real estate development subsidiaries from competing against each other in certain areas).

[131] McQuade, *supra* note 3, at 213; Sengel, *supra* note 3, at 22-27; Willis & Pitofsky, *supra* note 3, at 48-49; *Intra-Enterprise Conspiracy, supra* note 3, at 732-34.

[132] "Any cooperation or coordination between components of a multi-corporate enterprise can adversely affect the trade of outsiders if those outsiders happen to be suppliers, customers or competitors of the corporate unit." Willis & Pitofsky, *supra* note 3, at 49.

rather than on whether two affiliated corporations should be deemed capable of conspiracy. The critical question is not what is the effect of the restraint, but whether defendants are in fact separate entities.

While at least one court appears to have acknowledged implicitly that all intracorporate agreements inevitably restrain trade, it has attempted to draw a further distinction based on whether "the policy exerted an effect substantially similar to that of a conspiracy among independent companies in restraint of trade...."[133] This version of the standard is unsatisfactory because it is essentially meaningless. The court provides no guidelines as to how one determines whether the anticompetitive effect alleged is substantially similar to that of a conspiracy among independent competitors in restraint of trade when the Sherman Act also permits restraints by single enterprises that would be unlawful if engaged in by two competitors.[134]

3. Corporations Not Held Out as Competitors

As part of the effort to limit the intracorporate conspiracy doctrine, some courts have held that no combination or conspiracy exists where the affiliated corporations have not held themselves out as competitors.[135] This doctrine derives from the Supreme Court's emphasis in *Kiefer-Stewart* that the two corporations held themselves out as competitors.

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[133] *Chastain* v. *A.T.&T.*, 401 F. Supp. 151, 160 (D.D.C. 1975).

[134] *Cf. Intra-Enterprise Conspiracy, supra* note 3, at 733-34 (where the *Chastain* standard is criticized for failure to provide any standards for determining whether parent-subsidiary behavior adversely affects third parties).

[135] *E.g., Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1045 (E.D. Mich. 1976); *Call Carl, Inc.* v. *BP Oil Corp., 403 F. Supp. 568, 572-73 (D. Md. 1975), aff'd in part, rev'd in part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d cir. 1971), *cert. denied*, 408 U.S. 922 (1972).

Arguably, the Second Circuit has construed *Kiefer-Stewart* as limiting liability for intracorporate conspiracy to cases where two corporations hold themselves out as competitors. The district court so ruled in *Beckman* v. *Walter Kidde & Co.*,[136] where it distinguished *Kiefer-Stewart* "on the crucial ground that the conspiracy in that case was between two competing subsidiary companies . . . ."[137] On appeal, the Second Circuit, in a per curiam opinion, affirmed "substantially for the reasons and upon the reasoning contained" in the comprehensive opinion of the trial judge.[138]

If that were all, one could confidently assert that the district court's opinion in *Beckman* represents Second Circuit law. However, in *International Railways of Central America* v. *United Brands Co.*,[139] the court of appeals, after summarizing the respective arguments of the parties with regard to the proper scope of *Kiefer-Stewart* and after citing *Beckman*, refused to pass on whether an intracorporate conspiracy is actionable only where commonly owned corporations hold themselves out as competitors.[140] And more recently in *Triebwasser & Katz* v. *A.T. & T.*,[141] the court in a delphic footnote stated that "we cannot agree that the doctrine of 'intracorporate conspiracy' insofar as AT&T and its *non-competing* wholly owned subsidiary Telco are concerned is necessarily applicable,"[142] observing that it had expressly

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[136] 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*,, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972).

[137] *Id.* at 1325.

[138] 451 F.2d at 593.

[139] 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

[140] *Id.* at 240.

[141] 535 F.2d 1356 (2d Cir. 1976).

[142] *Id.* at 1358-59 n.1 (emphasis added). It should also be noted that more recently in *Fuchs Sugars & Syrups, Inc.* v. *Amstar Corp.*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979), the Second

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declined to decide the issue in the *United Brands* case. The court thus seems to have first opened the door for a reconsideration of *Beckman* and then to have partially closed it in *Triebwasser*.

In *Call Carl, Inc.* v. *BP Oil Corp.*,[143] the Maryland district court concluded that a gasoline marketer and its subsidiary were incapable of conspiring where they were "not competitors in the market in which prices are allegedly being fixed . . . ."[144] Although the Fourth Circuit affirmed the decision, it did so without considering the intracorporate conspiracy question which was not presented on appeal.[145]

While the doctrine that affiliated corporations who hold themselves out as competitors should be obligated to behave as such has a certain surface appeal, courts that have adopted it have not gone further to articulate why the factor should be significant in determining section 1 liability.[146] This is not surprising given the Supreme Court's failure to explain in *Kiefer-Stewart* why the fact that Seagram and

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Circuit, in determining whether a broker should be treated as a distinct economic entity, stated that "[w]hether the two actors constitute distinct economic entities for purposes of the Sherman Act is determined by the economic realities of their relationship." *Id.* at 1031 n.5. In support of this proposition the court cited *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), the case in which the Ninth Circuit first adopted the "all the facts and circumstances" test. *Id.* at 802 & n.4. *See* text accompanying notes 156-67 *infra*.

[143] 403 F. Supp. 568 (D. Md. 1975), *aff'd in relevant part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

[144] *Id.* at 572 (emphasis omitted).

[145] 554 F.2d at 628 n.4.

[146] *See also* Willis & Pitofsky, *supra* note 3, at 37; *Intra-Enterprise Conspiracy*, *supra* note 3, at 735.

Calvert had held themselves out as competitors made section 1 especially applicable to them.

Commentators Willis and Pitofsky suggest that "[t]he Supreme Court may have had some concept of estoppel in mind."[147] They acknowledge, however, that an estoppel doctrine ordinarily requires a finding that someone relying on appearances changed his position to his disadvantage, a factor to which the Court nowhere alluded in *Kiefer-Stewart*. They note further that the concept of expanded antitrust liability where affiliated companies hold themselves out to the public as competitors is supported by an old line of FTC cases which found deceptive use of subsidiaries to be an unlawful trade practice under section 5 of the FTC Act.[148] Similarly, they rely on *United States* v. *American Can Co.*,[149] where the court, in finding violations of sections 1 and 2 of the Sherman Act, stated that the defendants had resorted to deliberate deception in manipulating several subsidiaries to fight its general line competitors while still maintaining its own prices.[150] Willis and Pitofsky conclude that expanded liability for subsidiaries that publicly adopt a competitive posture is reasonable: "Failure of disclosure might well contribute to the kind of restrictive, single-firm conduct that is difficult to reach under the antitrust laws."[151]

This analysis does not provide a satisfactory or sufficient rationale for holding that affiliated companies as we have defined them are capable of conspiring. The line of FTC cases on which Willis and Pitofsky rely establishes that it is

[147] Willis & Pitofsky, *supra* note 3, at 37.

[148] *Id.* at 37-38. The cases are: *FTC* v. *A.A. Berry Seed Co.*, 2 F.T.C. 427 (1920); *FTC* v. *Armour & Co.*, 1 F.T.C. 430 (1919); *FTC* v. *Fleischmann Co., 1 F.T.C. 119 (1918).*

[149] 230 F. 859 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).

[150] *Id.* at 887.

[151] Willis & Pitofsky, *supra* note 3, at 38.

an act of unfair competition under section 5 of the FTC Act for a corporation to conceal its ownership of a subsidiary. Presumably, they anticipate that a rule holding that affiliated companies can conspire where they hold themselves out as competitors will encourage them either (a) not to hold themselves out as competitors, or (b) not to attempt to deceive anyone by holding themselves out as competitors.

However, they reach this conclusion without analyzing whether in all cases affiliated companies that hold themselves out as competitors have concealed their affiliation and are bent on a campaign to deceive their competitors or customers, which seems highly speculative at best. For example, in *Keifer-Stewart*, there is no suggestion that any of Seagram's competitors or customers were unaware of the affiliation between Seagram and Calvert (a fact which was apparently well-known in the industry) or that Seagram was attempting to conceal this fact from the industry to gain some advantage.[182] Although there may be instances in which a corporation attempts unfairly to gain a competitive edge by concealing its affiliation to its subsidiary, there has been no showing that section 5 of the FTC Act is inadequate

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[182] While it might be argued that the consuming public was unaware of the association between Seagram and Calvert, it would not provide a sufficient rationale for the doctrine even if that were the case. For while consumers might believe that Seagram and Calvert were competitors, this apprehension could well occur whether or not the two corporations had been separately incorporated. A corporation by selling two different brands through different divisions may well create the impression that the brands compete, but no one has suggested that this is a sufficient basis for imposing antitrust liability on divisions of the same corporation. *But see Hawaiian Oke & Liquors, Ltd.* v. *Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

to the task of policing such behavior[153] or that the problem is so great that it should be supplemented by a private right of action under section 4 of the Clayton Act.[154]

This is not to say that the "holding out as competitors" doctrine is not a useful doctrine. Adopton of this standard by courts clearly would eliminate efforts by plaintiffs to convert unilateral refusals to deal by a subsidiary into conspiracies in restraint of trade where the subsidiary refused to deal at the instructions of its parent. It would similarly make it difficult for plaintiffs to allege price-fixing against subsidiaries where the subsidiary received directions from its parent as to what price to charge. In short, it would eliminate a whole category of lawsuits where plaintiffs have attempted to gain treble damages by alleging conspiracy between a parent and a subsidiary which do not compete. This is not an inconsequential achievement as a review of the decided cases reveals. Indeed, cases in which parent-subsidiary or affiliated companies have held themselves out as competitors are the exception and not the rule in the reported decisions.

There are, however, conceptual problems with implementing the doctrine. For example, what are the indicia of a subsidiary holding itself out as a competitor with its parent or affiliate?[155] It is the fact that the affiliated companies sell the same product or service by itself sufficient or must they take some affirmative action to hold themselves out as competitors? Is the use of separate brands sufficient? How about separate advertising? What if the parent and subsidiary

[153] Indeed, the cases relied upon by Willis and Pitofsky suggest that there is existing law under both the Sherman and FTC Acts designed to deal with the deceptive use of subsidiaries.

[154] 15 U.S.C. § 15 (Supp. IV 1980).

[155] "[T]he elements of behavior that constitute 'holding out' have never been precisely delineated." *Intra-Enterprise Conspiracy*, *supra* note 3, at 735.

share common directors or officers but use different sales forces and different brand names to sell products that compete in the same market? What if one affiliate sells exclusively in one part of the country and the other sells exclusively in another part?

Conversely, would a corporation be capable of conspiring under this doctrine where it competed with its parent, subsidiary or affiliate, but emphasized the fact of affiliation to the industry? Is it possible that a corporation might inadvertently hold itself out as a competitor by advertising or by using a separate sales force when in fact it does not compete with its affiliated companies and does not intend to hold itself out as a competitor? What should be the legal consequences of such action?

4. The "All the Facts and Circumstances" Test

Recently, courts have begun to apply an "all the facts and circumstances" test to determine whether a parent and its subsidiary or affiliated corporations are a single economic entity.[154] Under this test, courts analyze all the facts and

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[154] *First Circuit: White* v. *Hearst Corp.*, No. 80-891-Z, at 4-5 (D. Mass. Apr. 9, 1981); *Second Circuit: Brager & Co., Inc.* v. *Leumi Sec. Corp.*, 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977), *aff'd*, 646 F.2d 559 (1980), *cert. denied*, 101 S. Ct. 2322 (1981); *Sulmeyer* v. *Seven-Up Co.*, 411 F. Supp. 635, 639-40 (S.D.N.Y. 1976); *I. Haas Trucking Corp.* v. *New York Fruit Auction Corp.*, 364 F. Supp. 868, 873 (S.D.N.Y. 1973); *Seventh Circuit: Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). *But cf. Tamaron Distrib. Corp.* v. *Weiner*, 418 F.2d 137, 139 (7th Cir. 1969) (allegations of conspiracy between manufacturers and noncompeting agent held sufficient to state a § 1 claim); *Eighth Circuit: Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981); *cf. TV Signal Co.* v. *A.T. & T.*, 462 F.2d 1256, 1260 (8th Cir. 1972) (holding that whether intracorporate conspiracy doctrine should be limited should be decided in light of actual facts and not determined on the pleadings). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973); *Ninth Circuit: William Inglis*

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circumstances regarding the relationship of the affiliated corporations to determine whether they are acting as independent entities capable of conspiring.

Knutson v. *Daily Review, Inc.*,[157] is the seminal case. Plaintiffs were independent distributors of newspapers published by defendant Daily Review, Inc. which published two daily papers and an advertising circular paper.[158] Codefendant Bay Area Publishing Company, a wholly owned subsidiary of Daily Review, published two of its own papers. Sparks, the controlling shareholder of Daily Review, was also the publisher of both companies' newspapers.[159] Historically, defendants had distributed newspapers through a system of independent dealers and had employed agreements that fixed retail prices.[160] After counsel for plaintiffs wrote Sparks stating that certain provisions of the dealer agreement of both Daily Review and Bay Area Publishing constitued unlawful restraints of trade, defendants notified plaintiffs "that they were terminating their entire independent dealer system for home delivery and were converting to a system of

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& Sons Baking Co. v. *ITT Continental Baking Co.*, 652 F.2d 917, 958 (9th Cir. 1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-58 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 801-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Island Tobacco Co.* v. *R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726, 740 (D. Hawaii 1981); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981).

[157] 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[158] *Id.* at 799-800.

[159] *Id.* at 800.

[160] *Id.*

employee-distributors."[161] Subsequently, the dealers brought suit, alleging that the dealer agreements were unlawful contracts that fixed prices and imposed territorial restraints on the distributors. They further claimed that the terminations were made in violation of section 1 of the Sherman Act.[162] The district court found that there was no conspiracy in fact because plaintiffs had not shown that anyone other than Sparks had made the decision to switch from an independent dealer system to employee-distribution.[163]

The Ninth Circuit affirmed, but on different grounds. The court, after raising the question, of "what, if any, limits should be and can be drawn on section 1 conspiracies in the separate incorporation situation,"[164] stated: "Antitrust law is concerned with the concerted action of distinct economic entities. In any case, whether such action has occurred turns on the particular facts."[165]

In determining that Daily Review and Bay Area Publishing comprised a single economic unit incapable of conspiring, the court stressed that the relationship between Daily Review and Bay Area Publishing far exceeded mere ownership: (a) Sparks was the controlling shareholder of each corporation and publisher of all five papers; (b) both corporations had the same individual in charge of important operations, such as circulation; (c) the two alleged individual coconspirators were employees or officers of both firms; (d) all three daily papers had news pages, such as sports and advertising, in common; and (e) Daily Review and Bay Area Publishing neither competed nor held themselves out as

[161] *Id.* at 801.

[162] *Id.*

[163] 383 F. Supp. 1346, 1359 (N.D. Cal. 1974), *modified*, 548 F.2d 795 (1976), *cert. denied*, 433 U.S. 910 (1977).

[164] 548 F.2d at 802.

[165] *Id.* (footnote omitted).

competitors.[166] The court concluded that "[a]rguably on these facts the two corporate units were incapable of conspiracy as a matter of law."[167]

Las Vegas Sun, Inc. v. *Summa Corp.*[168] is also illustrative of the "all the facts and circumstances" test. Plaintiff, the Las Vegas Sun newspaper, sued three corporations, each wholly owned by the late Howard Hughes, which operated hotels in Las Vegas, because the hotels had stopped advertising in plaintiff's paper.[169] The Ninth Circuit affirmed judgment for the defendants and held that they were incapable of conspiring.[170] The court stated that "[t]o determine whether

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[166] *Id.*

[167] *Id.* at 803. The court did not squarely hold, however, that the two corporations were legally incapable of conspiring because plaintiffs failed to show that any trade was restrained as a result of their terminations. *Id.* at 804.

Interestingly, the courts have developed a similar test in the context of § 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1976) (as amended by § 1 if the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936)), for determining whether a transaction between a parent and a subsidiary constitutes a "sale." *See, e.g., Brown* v. *Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir. 1977) (transfer of sheet music and music books between two subsidiaries wholly owned by the same individual, not a sale within the meaning of § 2(a)). In *Brown* the court evaluated all the facts and circumstances of the defendants' interrelations in concluding that the two subsidiaries were "parts of a single integrated enterprise and that transfers between them were indistinguishable from dealings within the same corporate entity." *Id.* at 972. For an excellent discussion of the "all the facts and circumstances" test in the context of § 2(a), see *Island Tobacco Co.* v. *R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726 (D. Hawaii 1981).

[168] 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

[169] *Id.* at 616.

[170] *Id.* at 618.

corporate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it."[171] It then examined in detail the relationship between the affiliated corporations, emphasizing the following facts: (a) the decision to terminate advertising in plaintiff's paper was made by the same individual for all six hotels; (b) the hotels involved neither competed nor held themselves out as competitors; (c) the hotel casinos represented themselves to the public as a single business entity; and (d) each of the six hotels paid for advertising out of a common corporation's prepaid advertising account.[172] The court thus concluded that plaintiff "essentially dealt with a single economic entity."[173]

The Seventh and Eighth Circuits have recently adopted the "all the facts and circumstances" test as well. In *Photovest Corp.* v. *Fotomat Corp.*,[174] Photovest, a franchisee of fifteen drive-thru photo-finishing kiosks in the Indianapolis area, brought a treble damage antitrust action against its franchisor, Fotomat, alleging that Fotomat had violated sections 1 and 2 of the Sherman Act, breached its contract with Photovest, and fraudulently induced Photovest to become a franchisee in the first place. The court made extensive findings of fact and awarded Photovest treble damages.[175]

On appeal, the Seventh Circuit affirmed the ruling that Fotomat had violated section 1 by requiring Photovest to purchase all of its print processing from Fotomat and lease Fotomat's kiosks as a condition to becoming a franchisee.[176]

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[171] *Id.* at 617.

[172] *Id.* at 618.

[173] *Id.*

[174] 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

[175] *Id.* at 707.

[176] *Id.* at 722, 725. The court also affirmed the district court's ruling that Fotomat had attempted to monopolize the drive-thru

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However, the court reversed the district court's ruling that Fotomat had engaged in an unlawful combination and conspiracy with its wholly owned subsidiary, Fotomat Labs, Inc., designed to eliminate Photovest as a retail competitor in violation of section 1. The Seventh Circuit held that Fotomat and Fotomat Labs, Inc. were a single entity incapable of conspiring.[177]

The court stated that it "must decide each case on its particular facts" to determine whether separate corporations are single enterprises incapable of conspiring.[178] The court concluded that Fotomat and Fotomat Labs should be treated as a single entity because (a) the companies had been incorporated separately to minimize potential labor relations friction; (b) management and offices of the corporations overlapped; (c) profit-related compensation for personnel of both companies was based on Fotomat's profitability alone; (d) the companies used consolidated financial statements for all external purposes; (e) Fotomat's subsidiaries were lumped together with Fotomat and referred to as "the Company" in all publicly circulated financial statements; and (f) Fotomat Labs served solely as a resource for Fotomat and provided no services to non-Fotomat customers.[179] Curiously, although the record indicates quite clearly that the parent and subsidiary did not compete, the court did not expressly rely on this fact. On these facts the court concluded that "[t]o find the two actors necessary for a § 1 conspiracy . . . would not be significantly different from holding, contrary to good author-

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retail photo processing submarket in the Indianapolis metropolitan area in violation of § 2 by, *inter alia*, saturating the market with its own stores as a part of a plan to drive Photovest out of business. 606 F.2d at 714-21.

[177] *Id.* at 726-27.

[178] *Id.* at 726.

[179] *Id.* at 726-27.

ity, that a corporation can conspire in violation of 1 with its wholly-owned, unincorporated sales division . . . ."[180]

The Eighth Circuit recently adopted the same test in *Ogilvie* v. *Fotomat Corp.*,[181] where once again, disgruntled franchisees of Fotomat brought suit. The Eighth Circuit reversed the jury's verdict that Fotomat and Fotomat Labs had conspired to drive plaintiffs out of business. The court applied the "all the facts and circumstances" test to conclude that the two defendants were a single economic entity and thus would be entitled to defend the conspiracy charges on that ground.[182] The court reasoned that allowing the defense would not exalt "form over substance in a manner inconsistent with the intent of the antitrust laws."[183] In holding that there was insufficient evidence to support the jury's finding that the two companies were in fact separate, the Eighth Circuit cited essentially the same facts as those on which the Seventh Circuit relied in its opinion.[184]

The "all the facts and circumstances" test has several weaknesses. First, the test has no precise contents or contours, so it is difficult, if not impossible, to predict what facts will satisfy it. Presumably, the test is met by an accumula-

[180] *Id.* at 727.

[181] 641 F.2d 581 (8th Cir. 1981).

[182] *Id.* at 590.

[183] *Id.* at 588.

[184] (a) Fotomat referred to itself and its subsidiary collectively as "the Company"; (b) corporate officers of Fotomat always served as officers of Fotomat Labs; (c) bonuses and other executive remuneration over fixed salaries were based on calculations of Fotomat's profit alone; (d) Fotomat Labs had no headquarters separate from those of Fotomat; (e) Fotomat and Fotomat Labs filed consolidated financial statements; and (f) the uncontroverted evidence established that Fotomat had incorporated Fotomat Labs for the purposes of according disparate labor benefits to the two companies' employees and availing itself of certain tax benefits. *Id.* at 589.

tion of facts, individually insufficient, that lead to the conclusion that a parent and subsidiary are no different from a corporation and its unincorporated divisions. The problem is to determine which facts are necessary and why. Suppose, for example, that Fotomat had incorporated Fotomat Labs, not to gain tax benefits and avoid labor friction, but for some other purpose, such as limiting Fotomat's liability? Would that change the result reached by the two circuits? Or suppose that all other facts remained the same but that Fotomat and Fotomat Labs did not share common officers or offices? At what point do the indicia of control become so great that it becomes necessary as a matter of law to treat the two corporations as a single entity? What weight should be given under this test to the fact that two corporations hold themselves out as competitors?

If a corporation permits a subsidiary a large degree of freedom and autonomy, which may be desirable from a business point of view and from the standpoint of efficiency, it may be found capable of conspiring under the "all the facts and circumstances" test. On the other hand, if the parent never lets the subsidiary behave independently the chances are reduced of being held liable for violation of section 1. Faced with these standards, a company wishing to avoid antitrust exposure should exercise as much control as possible over its subsidiaries. At the same time, it must be recognized that the same facts on which the parent will rely to show that it is legally incapable of conspiring may well be relied on by plaintiff's counsel to argue that the requisite combination, contract, or conspiracy under section 1 has been established.[185]

[185] For example, while the fact that management and corporate headquarters of parent and subsidiary overlap may provide an argument that the two corporations are legally incapable of conspiring, this overlap will also increase the chance that in fact the parent is dictating decisions to the subsidiary, which plaintiff's

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There is a question under the "all the facts and circumstances" test regarding what role the jury is to play in determining whether a parent and subsidiary or affiliates are a single economic unit incapable of conspiring. In *Las Vegas Sun*, the Ninth Circuit stated that the district court's finding that Hughes Hotels neither competed with one another nor held themselves out as competitors was not "clearly erroneous,"[186] the standard of review for a fact finding in a nonjury trial. However, the district court in *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*,[187] after submitting the issue to the jury, opined that "[o]n reflection" the question "seems . . . to be more of a legal than factual issue (*at least where as here none of the relevant facts are disputed*) and hence more properly resolved by the Court. . . ."[188]

The inconsistency between these two cases on this issue is more apparent than real. To the extent that there are disputed issues of fact with respect to the presence and nature of the various corporate interrelationships pertinent to the "all the facts and circumstances" test, they must be resolved by the factfinder. On the other hand, where the case is tried to a jury, the jury should not be left adrift in an uncharted

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counsel will seize upon as evidence of agreement or conspiracy under § 1.

[186] 610 F.2d at 618.

[187] 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981).

[188] *Id.* at 859 n.15 (emphasis added). ***But see Broadway Delivery Corp.*** **v. *United Parcel Serv.*, 651 F.2d 122, 126 n.2 (2d Cir.), *cert. denied*, 50 U.S.L.W. 3351 (Nov. 2, 1981) (No. 81-445) (Second Circuit, in affirming the district court's ruling that plaintiffs had abandoned their intracorporate conspiracy claim, stated in a footnote that the Third and the Fifth Circuits have determined that the applicability of the intracorporate conspiracy doctrine is a matter of law and that the Seventh, Eighth, and Ninth Circuits have decided that it is an issue of fact.)**

sea to determine whether separate but affiliated companies function as a single economic unit. That ultimate issue must be carefully framed by appropriate instructions from the court so that the jury is, indeed, finding "facts" and not announcing "law."

If such precise instructions are not provided, the likelihood of inconsistent results under the test increases. While the courts are likely to follow the precedents and hold that the defense is established on fact patterns similar to those found in other cases, there is no assurance that juries, unless instructed precisely as a matter of law as to what facts are sufficient for the defense, will reach the same conclusions regarding similar facts.[189]

III. The Intracorporate Conspiracy Doctrine Serves No Useful Purpose

There is a remarkable absence in the intracorporate conspiracy case law of any antitrust or other public policy justification for the conclusion that affiliated corporations are legally capable of conspiring under section 1 of the Sherman Act. The principal justification to be found is Justice Black's refrain in *Perma Life* that those who have availed themselves of the privilege of doing business through separate corporations must also accept the detriments.[190] This rationale, however, is not directly related to antitrust policy goals. In this section we analyze Justice Black's reasoning and conclude that it does not sufficiently support the intracorporate conspiracy doctrine. We next consider the role of the intracorporate conspiracy doctrine in modern antitrust law. We conclude that the doctrine it used largely in attempts to

[189] In *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), the court noted that "[t]he capacity [to conspire] issue was submitted by the Court to the jury, which apparently encountered great difficulty in dealing with it." *Id.* at 859 n.15.

[190] 392 U.S. at 141-42.

reach behavior not otherwise actionable under sections 1 and 2 of the Sherman Act, that there is no need to fill the gap between sections 1 and 2, and that, in any event, the intracorporate conspiracy doctrine is ill-suited to the intended task. It is not in accord with the goals of section 1 and serves only to confuse the law and encourage meritless lawsuits.[191] The time has come for either Congress or the courts to jettison the intracorporate conspiracy doctrine.

A. Justice Black's Rationale

In *Perma Life,* Justice Black in essence stated as a justification for holding that Midas and its subsidiaries had conspired under section 1 that those who accept the benefits of incorporation must accept the detriments.[192] However, Justice Black's rationale does not suggest that the benefits of separate incorporation affect competition or the competitive process. He makes no attempt to justify the intracorporate conspiracy doctrine on the basis of antitrust policy considerations.

The reasoning of *Perma Life* ignores the salient fact that there is nothing inherently anticompetitive about the use of corporate subsidiaries. Subsidiaries are formed in response to a variety of legitimate legal and financial considerations wholly unrelated to the concerns of antitrust law.[193] More-

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[191] *See* notes 215-34 *infra* & accompanying text.

[192] In *Perma Life* Justice Black also implied that the intracorporate conspiracy doctrine should be upheld in order to facilitate private enforcement of the Sherman Act. *See id.* at 136. Assuming arguendo that this is an alternative rationale for the doctrine, analysis of the intracorporate conspiracy cases indicates that private enfoecement would not be undermined by eliminating the doctrine insofar as the cases can be brought and decided on other grounds. *See* text accompanying notes 58-62 *supra.*

[193] Among the reasons frequently cited for doing business through a subsidiary rather than a division are: (1) greater managerial flexibility; (2) greater financial flexibility; (3) tax ad-

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over, certain of the advantages of doing business through a subsidiary result in economic efficiencies[194] that promote competitive behavior. For example, to the extent that a company is able to cut costs and distribute its products more efficiently through a wholly owned subsidiary because of tax or labor advantages which result from separate incorporation, competition may well intensify. A corporation may decide to create a subsidiary in order to enter a new market that it would not enter without the advantages which separate incorporation provides. In such circumstances competition should increase and consumers benefit. While use of subsidiaries to gain tax and other advantages can be subject to abuse,[195] there is no reason to believe—and neither the cases nor commentaries suggest—that such abuse has any anticompetitive consequences.[196]

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vantages available under the Internal Revenue Code; (4) easier acquisition of new capital; (5) expansion of operations into a new territory or country where local law prohibits or makes onerous operation of the parent within the territory or country; (6) limitation or tort and contract liability; (7) increased efficiencies in production or distribution; (8) facilitation of resort to various accounting methods, tax credit elections, or accounting periods most suitable to specialized needs; (9) facilitation of or avoidance of antidiscrimination limitations on pension and profit-sharing plans; and (10) maintenance of the goodwill or *espirit de corps* associated with a particular subsidiary. See McQuade, *supra* note 3, at 186; Willis & Pitofsky, *supra* note 3, at 27-28; *Intra-Enterprise Conspiracy, supra* note 3, at 728-29.

[194] *See Intra-Enterprise Conspiracy, supra* note 3, at 728.

[195] Willis & Pitofsky, *supra* note 3, at 27.

[196] "One looks in vain in *Perma Life* or in any of the cases on which it relies for any policy justifying a doctrine which on its face is repugnant to common sense. Certainly the use of corporate subsidiaries offends no recognized antitrust policy." *Antitrust Looking Glass, supra* note 3, at 187.

It is not at all clear precisely what the benefits of separate incorporation are from the standpoint of limiting the parent's liability. State and federal courts permit plaintiffs to "pierce the corporation veil" and recover against subsidiaries and their parents, even absent fraud, under a number of alternative theories.[197] This development in corporate law further undermines Justice Black's reasoning. If a corporation so controls its subsidiary that it is liable for the subsidiary's torts or breaches of contract, the parent and subsidiary are treated by the law in effect as a single enterprise. Thus, they obtain no benefits of separate incorporation and under Justice Black's reasoning should similarly be held incapable of conspiring for purposes of section 1. Significantly, in determining whether to pierce the corporate veil courts have stressed a variety of facts which mirror to a large extent those that the Seventh, Eighth, and Ninth Circuits have considered in upholding the single enterprise defense

[197] In formulating a basis for piercing the corporate veil to hold a parent liable for its subsidiary's acts, courts have employed a number of tests to determine whether the parent so dominates the subsidiary that it should fairly be held liable. Under the "identity" theory, separate corporate forms are disregarded and both corporations are treated as one. *See, e.g., United States* v. *Lehigh Valley R.R.*, 220 U.S. 257, 271-74 (1911). A corporation will also be held liable for the acts of its subsidiary where the subsidiary has been labeled the instrument, agent, or adjunct of the dominant corporation. *E.g., Constitution Publishing Co.* v. *Dale*, 164 F.2d 210, 213 (5th Cir. 1947). More popular still are the terms "instrumentality" or "agency" which are frequently used to describe those facts which justify holding the parent liable for the acts of its subsidiary. *E.g, DeWitt Truck Brokers, Inc.* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685-87 (4th Cir. 1976); *Krivo Indus. Supply Co.* v. *National Distillers & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973), *modified factually*, 490 F.2d 916 (5th Cir. 1974) (per curiam); *House of Koscot Dev. Corp.* v. *American Line Cosmetics, Inc.* 468 F.2d 64, 66-67 (5th Cir. 1972); *Japan Petroleum Co. (Nigeria)* v. *Ashland Oil, Inc.*, 456 F. Supp. 831, 838-41 (D. Del. 1978).

by separately incorporated companies to determine whether the parent and its subsidiary should be treated as a single entity.[198] Likewise, however, the facts conducive to a finding of intracorporate conspiracy tend to be the same as those which justify piercing the corporate veil.

The Supreme Court has stated that "[i]t is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management."[199] As in the "all the facts and circumstances" test, there is no precise set of factors which can be said to be sufficient to establish the degree of dominance required to justify piercing the corporate veil. "The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary."[200] The fact that the parent owns all the stock of a subsidiary is not sufficient by itself,[201] nor is the fact that the parent and subsidiary share common officers and directors.[202] Similarly, the fact that a parent corporation finances the operations of a subsidiary is not by itself sufficient.[203] Rather, it is a combination of these facts plus other facts and circumstances that establish the dominance necessary for piercing the corporate veil.

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[198] *See* note 206 *infra* & accompanying text. We do not mean to suggest that there is a complete congruence between these factors and how the courts would come out under each of the tests. However, we think it is significant that two different areas of law are grappling with the same factual constructs.

[199] *Japan Petroleum Co. (Nigeria)* v. *Ashland Oil, Inc., 456 F. Supp. 831, 838 (D. Del. 1978) (quoting Consolidated Rock Prods. Co.* v. *Du Bois, 312 U.S. 510, 524 (1941)).*

[200] *Id.* at 841.

[201] *Id.*

[202] *Id.*

[203] *Id.*

In *Fish* v. *East*,[204] the Tenth Circuit suggested the following list of factors to be considered in determining whether to hold the parent liable for the actions of its subsidiary:

> (1) The parent corporation owns all or majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors or officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.[205]

A review of the cases indicates that the facts relied on by courts in deciding whether to pierce the corporate veil—such as stock ownership, common officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origins of subsidiary's business and assets[206]—are similar to the facts which the

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[204] 114 F.2d 177 (10th Cir. 1940).

[205] *Id.* at 191.

[206] *See Oppenstein* v. *Consolidated Sun Ray, Inc.*, 216 F. Supp. 268 (W.D. Mo. 1963), *aff'd in relevant part*, 335 F.2d 801 (8th Cir. 1964); *cf. Japan Petroleum Co. (Nigeria)* v. *Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978) (where the court refused to pierce the corporate

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Seventh, Eighth, and Ninth Circuits have analyzed in determining that a parent and its subsidiary are a single entity for purposes of section 1. While it is not our thesis that in each intracorporate conspiracy case the parent so dominated the subsidiary that the corporate veil would be pierced under corporate law, it appears that the intracorporate conspiracy doctrine has flourished in an environment which is most conducive to piercing the corporate veil. The greater the dominance of the subsidiary by the parent, the easier it is to prove an actual agreement under section 1. Therefore, conspiracy allegations more likely will be made against parents that exercise a large degree of control over their subsidiaries. Consequently, the benefits of separate incorporation may be less probable in the very cases most likely to result in conspiracy allegations under the intracorporate conspiracy doctrine. In sum, the benefits of incorporation are not so obvious as Justice Black's refrain would suggest.

This is not to suggest, however, that corporations should be able to assert that they are incapable of conspiring only where the parent exercises such a degree of control over the subsidiary that the corporate veil would be pierced. There exist numerous corporations that might well be able to protect themselves from liability under state law for acts of their subsidiaries, which in our view nevertheless should be considered indistinguishable from their subsidiaries for purposes of section 1. Two reasons support this conclusion. First, as we have already shown, corporations are never held liable for conspiring with their own divisions even though the divisions may well have greater autonomy and independence of action than many subsidiaries. Second, as we

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veil and hold the parent liable for the alleged breach of contract by the subsidiary despite numerous overlaps and interconnections between the parent and the subsidiary). *See also Fitz-Patrick* v. *Commonwealth Oil Co.*, 285 F.2d 726 (5th Cir. 1960).

discuss in the next section, there is no antitrust policy basis or justification for holding that affiliated corporations are capable of conspiring, and to do so creates more mischief than it cures.

B. There Is No Need for the Intracorporate Conspiracy Doctrine

None of the courts that have considered or applied the intracorporate conspiracy doctrine has directly addressed the question of whether there is a real need for the doctrine as a matter of antitrust policy. Why should there be an intracorporate conspiracy doctrine in the first place? How does it advance the policies and goals of the antitrust laws?

Rigorous application of the doctrine would merely result in corporations converting subsidiaries into divisions, which in no way advances any antitrust goals. In recognition of this fact, the Justice Department has eschewed the doctrine in the main,[207] as has the FTC after some flirtation with it in

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[207] "We should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest." Turner, *Address Before the American Bar Association*, 10 ANTITRUST BULL. 685, 687 (1965). *See also* text accompanying notes 127-28 *supra*.

Moreover, numerous consent decrees provide that the prohibitions therein are inapplicable to activities involving a corporation and its subsidiaries, parent corporations, officers, directors, and employees on the ground that they are a single unit. *See, e.g.*, *United States* v. *Beech Aircraft Corp.*, [1965] Trade Cas. ¶ 71,570 (D. Kan.); *United States* v. *Studebaker Corp.*, [1965] Trade Cas. ¶ 71,410 (D. Neb.); *United States* v. *Elgin Corp.*, [1965] Trade Cas. ¶ 71,339 (N.D. Ill.); *United States* v. *Sperry Rand Corp.*, [1965] Trade Cas. ¶ 71,330 (N.D. Ill.); *United States* v. *Greater N.Y. Roll Bakers Ass'n*, [1964] Trade Cas. ¶ 71,265 (S.D.N.Y.); *United States* v. *Honeywell, Inc.*, [1964] Trade Cas. ¶ 71,224 (D. Minn.); *United States* v. *American*

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the early 1950's.[208] The doctrine has thus played a very small role in government enforcement of the antitrust laws.[209]

It has served principally as a tool for plaintiffs in private treble damage actions to attempt to reach behavior not covered by section 2 and which is actionable under section 1 only if engaged in by two or more entities. The intracorporate conspiracy doctrine has taken seed and grown in private actions because it is easier to prove a violation of section 1 than of section 2.[210] To recover under section 1 a plaintiff must show (1) the existence of a contract, combination, or conspiracy; (2) constituting an unreasonable restraint

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Cyanamid Co., [1964] Trade Cas. ¶ 71,166 (S.D.N.Y.); *United States* v. *Kaynar Mfg. Co.*, [1964] Trade Cas. ¶ 71,121 (S.D. Cal.).

[208] Under a consent order entered in 1954, Schenley Industries was prohibited from conspiring, combining, or even consulting with any of its subsidiaries or affiliated companies with respect to price and related matters. *In re* Schenley Indus., Inc., 50 F.T.C. 747, 751-52 (1954). *See also In re* Distillers Corp.-Seagrams, Ltd., 50 F.T.C. 738 (1954). In the mid-1960's, Schenley petitioned the Commission for a modification of the order, arguing that since its entry, the intracorporate conspiracy doctrine had been discredited and thus the restrictions were no longer warranted. The Commission rejected Schenley's application. *United States* v. *Schenley Indus., Inc.*, [1966] Trade Cas. ¶ 71,897 (S.D.N.Y.). *See Misadventures in Antitrust*, *supra* note 3, at 119-20. Since then, however, the FTC has not pursued cases based on the intracorporate conspiracy doctrine.

[209] *See* Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 452-53 (1973).

[210] "Thus, the intra-enterprise conspiracy doctrine has developed as an *ad hoc* response to the needs of the litigator rather than to foster a clearly-defined economic policy." Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 374 (1954).

of trade resulting therefrom,[211] and (3) causing antitrust injury.[212] To prove a violation of section 1 plaintiff must have at least two actors. In contrast, section 2 reaches single firm conduct, but only when plaintiff proves (1) specific intent to monopolize; (2) conduct designed to implement that intent; and (3) a dangerous probability of success;[213] or (a) possession of monopoly power; and (b) willful acquisition or maintenance of that power.[214]

Our review of the intracorporate conspiracy cases indicates that almost half involve disputes between a supplier and its customers arising out of a termination of or refusal to deal, entry by the supplier into competition with the customer, or alleged discrimination by the supplier in favor of its wholly owned subsidiary.[215] We do not believe that there is any

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[211] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59-60 (1911).

[212] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

[213] *See* Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 125-26 (1980). Plaintiff must also prove, as in the case of § 1, antitrust injury as a result of the violation.

[214] *Id.* at 126 n.8.; *United States* v. *Grinnel Corp.*, 384 U.S. 563, 570-71 (1966).

[215] *First Circuit: White* v. *Hearst Corp.* No. 80-891-Z, at 2 (D. Mass. April 9, 1981); *Second Circuit: Triebwasser & Katz* v. *A.T. & T.*, 535 F.2d 1356 (2d Cir. 1976); *International Rys.* v. *United Brands Co.*, 532 F 2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Reimer* v. *General Motors Corp.*, 511 F. Supp. 1167 (S.D.N.Y. 1981); *Far E. Coconut Co.* v. *Sun Ripe Coconut Corp.*, [1979-2] Trade Cas. ¶ 62,878 (E.D.N.Y.); *Giant Paper & Film Corp.* v. *Albemarle Paper Co.*, 430 F. Supp. 981 (S.D.N.Y. 1977); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110 (E.D.N.Y. 1976); *I. Haas Trucking Corp.* v. *New York Fruit Auction Corp.*, 364 F. Supp. 868 (S.D.N.Y. 1973); *Suburban Car Rentals, Inc.* v. *IT&T*, [1973-1] Trade Cas. ¶ 74,552 (S.D.N.Y.); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 92

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need as a matter of antitrust policy to adopt the intracorporate conspiracy doctrine to police such behavior.

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(1972); *Sanib Corp.* v. *United Fruit Co.*, 135 F. Supp. 764 (S.D.N.Y. 1955); *Ozdoba* v. *Verney Brunswick Mills, Inc.*, 152 F. Supp. 136 (S.D.N.Y. 1946); *Third Circuit: Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972); *Rea* v. *Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa. 1973), *rev'd*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Mt. Lebanon Motors, Inc.* v. *Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969); *Fourth Circuit: Call Carl, Inc.* v. *BP Oil Corp.*, 403 F. Supp. 568 (D. Md. 1975), *aff'd in relevant part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388 (D. Md. 1950), *aff'd*, 189 F.2d 79[illegible] (4th Cir. 1951); *Fifth Circuit: H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Seventh Circuit: Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039 (E.D. Mich. 1976); *America's Best Cinema Corp.* v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Inc. 1972); *Eighth Circuit: Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973); *TV Signal Co.* v. *A.T.&T.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co.* v. *A.T.&T.*, 5 TRADE REG. REP. (CCH) 1981-1 Trade Cas.) ¶ 63,944 (D.S.D. Mar. 13, 1981); *Schaben* v. *Samuel Moore & Co.*, 462 F. Supp. 1321 (S.D. Iowa 1978), *aff'd per curiam*, 606 F.2d 831 (8th Cir. 1979); *Phi Delta Theta Fraternity* v. *J. A. Buchroeder & Co.*, 251 F. Supp. 968 (W. D. Mo. 1966); *Ninth Circuit: Las Vegas Sun Inc.* v. *Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Island Tobacco Co.* v. *R. J. Reynolds Indus., Inc.*, 513 F. Supp. 726 (D. Hawaii 1981); *Fisher* v. *Coca-Cola Bottling Co.*, [1979-1] Trade Cas. ¶ 62,514(C.D. Cal.); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *Alpha Distrib. Co.* v. *Jack Daniel's Distillery*, 207 F. Supp. 136 (N.D.

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It is clear that unilateral refusals to deal and dealer terminations are lawful under the *Colgate* doctrine[216] when engaged in by a single enterprise. Thus, a manufacturer may refuse to deal with a distributor based on its own "business judgment," which the court may not "second guess."[217] Plaintiffs in the dealer termination and refusal to deal cases are typically former dealers, distributors, or franchisees who have been replaced with a competitor by defendants or the defendant subsidiary itself. Such refusals to deal do not give rise to section 1 liability when undertaken by a single manufacturer.[218]

The intracorporate conspiracy doctrine simply provides a technical basis for plaintiffs to attempt to avoid this well-recognized right of a manufacturer to determine unilaterally

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Cal. 1961), *aff'd*, 304 F.2d, 451 (9th Cir. 1962); *D.C. Circuit: Chastain* v. *A.T.&T.*, 401 F. Supp. 151 (D.D.C. 1975).

[216] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). *See* notes 6 & 18 *supra* & accompanying text.

[217] *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[218] In *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976), the Second Circuit stated the applicable rule of law as follows:

> Where a manufacturer simply decides on his own to substitute one dealer for another, and cuts off the former dealer, his decision to sell exclusively to a new dealer does not amount to an antitrust "conspiracy" with the latter, even though the manufacturer has agreed . . . to transfer patronage to him and to terminate sales to the former dealer.

Id. at 1254 (citations omitted). Other courts have reasoned that there is no unreasonable restraint of trade or indeed any effect on competition at all as a result of such substitution. *See, e.g., Ace Beer Distribs. Inc.* v. *Kohn, Inc.*, 318 F.2d 283, 286-87 (6th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963).

to whom he will sell and on what terms.[219] A vertically integrated manufacturer which operates its distribution arm as a division may rely on *Colgate* and refuse to deal. On the other hand, under the intracorporate conspiracy doctrine, a vertically integrated company which operates its distribution arm as a subsidiary risks treble damages if it orders its subsidiary to refuse to deal with a customer. No antitrust goals are advanced by this result, and treble damages would be awarded for what is at most a technical violation of the statute.[220]

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[219] "In the absence of any purpose to create or maintain a monopoly the [Sherman A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919).

[220] Indeed, the Fifth Circuit has warned former distributors against the temptation of treble damages in the typical dealer termination case even where there is evidence of conspiracy among nonaffiliated defendants:

> Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.

Burdett Sound Inc. v. *Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975) (citations omitted).

A second category of intracorporate conspiracy cases involve alleged price-fixing agreements.[221] In *Perma Life*,[222] the holding of intracorporate conspiracy was unnecessary to the result reached because there was ample evidence that defendants had required plaintiffs to adhere to their resale prices.[223]

Other intracorporate conspiracy price-fixing cases are clearly designed to reach behavior which would be lawful if engaged in by a single economic entity. In *Keifer-Stewart*,[224] it would have been perfectly lawful under the *Colgate* doctrine for Calvert to have refused to sell to plaintiff had Calvert's policy of refusing to deal been agreed upon with its sister division rather than with its affiliate. In *United States* v. *Arkansas Fuel Oil Corp.*,[225] the district court rejected the notion that "the mere approval by a parent corporation of the price schedules and pricing policies inaugurated and

[221] *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Kiefer-Stewart Co.*, v. *Joseph E. Seagram, & Sons, Inc.*, 340 U.S. 211 (1951); *Du Pont Glore Forgan Inc.* v. *A.T.&T.*, 437 F. Supp. 1104 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *REA Express* v. *Alabama Great S. R.R.*, 427 F. Supp. 1157 (S.D.N.Y. 1976), *aff'd mem. sub nom. Souerwine* v. *United States*, 431 U.S. 961 (1977); *Barr* v. *WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975); *Kane* v. *Martin Paint Stores, Inc.*, [1974-2] Trade Cas. ¶ 75,296 (S.D.N.Y.); *United States* v. *Arkansas Fuel Oil Corp.*, (1960) Trade Cas. ¶ 69,619 (N.D. Okla.).

[222] 392 U.S. 134 (1968).

[223] *See* text accompanying note 59 *supra*. Similar, for example, in *Kane* v. *Martin Paint Stores, Inc.*, [1974-2] Trade Cas. ¶ 75,296 (S.D.N.Y.), the alleged price-fixing conspiracy among the parent and its subsidiary to require plaintiff to sell at fixed prices was duplicative of the claim that the franchisee's written agreement had required it to sell at prices dictated by defendants, which would be actionable by itself.

[224] 340 U.S. 211 (1951).

[225] [1960] Trade Cas. ¶ 69,619 (N.D. Okla.).

fixed by the subsidiary corporation . . . constitute[s] a *per se* violation of the Sherman Act."[226]

A third category of intracorporate conspiracy cases involves allegations that the defendant violated sections 1 and 2 by using unfair methods of competition to eliminate plaintiff as a competitor.[227] Typical allegations are that defendant and its affiliate misrepresented facts regarding plaintiff or disparaged its reputation,[228] threatened and intimidated plaintiff, or sought improperly or unethically to influence plaintiff's customers,[229] all with the purpose and effect of driving plaintiff out of business. There is no need for the intracorporate conspiracy doctrine to control such behavior. To the extent that the behavior at issue has actually risen to

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[226] *Id.* at 76,496. In *REA Express* v. *Alabama Great S. R.R.*, 427 F. Supp. 1157 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977), REA Express sued its former owners, numerous railroads, alleging that the agreement between the railroads (then REA's parent corporations), and REA on the interest rates on REA's nonnegotiable debt was a conspiracy in restraint of trade, which the Court rejected as "border[ing] on the frivolous." *Id.* at 1166.

[227] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1974); *Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683 (2d Cir. 1963); *Superior Models, Inc.* v. *Tolkien Enterprises*, 5 TRADE REG. REP. (CCH) (1981-2 Trade Cas.) ¶ 64,157 (D. Del. June 16, 1981); *Brager & Co.*, v. *Leumi Sec. Corp.*, 429 F. Supp. 1341 (S.D.N.Y. 1977), *aff'd mem.*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 2322 (1981); *Ozdoba* v. *Verney Brunswick Mills, Inc.*, 152 F. Supp. 136 (S.D.N.Y. 1946).

[228] *Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683 (2d Cir. 1963); *Superior Models, Inc.* v. *Tolkien Enterprises*, 5 TRADE REG. REP. (CCH) (1981-2 Trade Cas.) ¶ 64,157 (D. Del. June 16, 1981).

[229] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Brager & Co.* v. *Leumi Sec. Corp.*, 429 F. Supp. 1341 (S.D.N.Y. 1977), *aff'd mem.*, 646 F.2d Cir. 1980), *cert. denied*, 101 S. Ct. 2322 (1981).

the level of a dangerous probability of success in a relevant market, section 2 is adequate to the task. For behavior falling short of an attempt to monopolize, existing remedies are available under both the FTC Act and common law principles of unfair competition.[230]

The Federal Trade Commission is empowered to enjoin "unfair methods of competition" and "unfair and deceptive acts and practices," and has pursued its mandate against a variety of behavior similar to that alleged in intracorporate conspiracy cases.[231] The vast majority of FTC cases have related to such practices as false advertising, passing off, deceptive packaging, commercial disparagement, threats of physical violence, and other unfair competitive behavior.[232]

Similarly, the common law of unfair competition reaches such behavior as misappropriation of trade secrets, false advertising and misbranding, passing off, disparagement of competitor's goods, molestation and physical interference, and interference with contractual relations.[233] While the law of unfair competition, unlike section 1, does not provide for treble damages, it makes little sense from an antitrust point of view to award treble damages for acts of unfair competition performed by a parent and its wholly owned subsidiary but not to do so when the very same unfair competitive practices are carried out by a company through its division.[234]

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[230] For a complete discussion of the ability of the FTC to reach single firm conduct falling short of an attempt to monopolize and of the remedies available under common law principles of unfair competition, see Handler & Steuer, *supra* note 213, at 174-82.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] A final category of intracorporate conspiracy cases involves a miscellany of alleged practices, but review of them once again suggests that the doctrine serves no purpose. *See Broadway Delivery*

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Finally, to the extent there may be a need to reach behavior not covered by sections 1 and 2 of the Sherman Act, the

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Corp. v. *United Parcel Serv., Inc.*, 651 F.2d 122 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3351 (Nov. 2, 1981) (No. 81-445) (predatory pricing); *Brayman* v. *Bassett Furniture Indus., Inc.*, 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977) (exclusive dealing); *United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (alleged tie-ins); *Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128 (N.D. Cal. 1981) (restrictive employment practices); *Las Vegas Drive-In Theatre, Inc.* v. *National Gen. Theatres Inc.*, [1979-2] Trade Cas. ¶ 62,895 (D. Nev.) (bad faith litigation); *Handgards, Inc.* v. *Johnson & Johnson, Inc.*, 413 F. Supp. 921 (N.D. Cal. 1975) (bad faith litigation); *Williams* v. *Pennsylvania Co.* (*In re* Penn Central Sec. Litigation), 367 F. Supp. 1158 (E.D. Pa. 1973) (territorial restraints); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956) (predatory pricing).

Allegations of intracorporate conspiracy merely duplicate existing remedies for alleged unlawful tie-ins and exclusive dealing. Under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), there is no conspiracy requirement, and the requisite plurality of actors under § 1 is supplied in tie-in and exclusive dealing cases by the plaintiff who is the subject of the unlawful requirement. As for territorial restraints, existing case law brands horizontal restraints per se unlawful, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972), and subjects vertical agreements to a rule of reason analysis, *Continental T.V., Inc.* v. *G.T.E. Sylvania Inc.*, 433 U.S. 36, 47-59 (1977). The requisite plurality of actors is supplied by the party subject to the restriction.

Remedies for predatory pricing already exist under § 2(a) of the Clayton Act. 15 U.S.C. § 13(a) (1976) (as amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936)). *See, e.g., Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 702-03 (1967). While the courts and the commentators in recent years have engaged in extensive analysis of what cost standard should be applied in determining whether pricing is in fact predatory, no one has suggested that allegations of intracorporate conspiracy add any-

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intracorporate conspiracy doctrine seems ill-suited to the task. It would only reach behavior not rising to the level of a section 2 violation in the fortuitous circumstance where a parent operated through a subsidiary with which an agreement could be shown. It would not reach the same behavior engaged in by another company which did not operate through a subsidiary. If such behavior is to be outlawed, a more evenhanded and less fortuitous approach should be devised.

IV. Conclusion—The Intracorporate Conspiracy Doctrine Should Be Jettisoned

The principal criticism of the intracorporate conspiracy doctrine is that it exalts form over substance without providing any countervailing antitrust benefits. While it might be

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thing to existing remedies for predatory pricing. *See, e.g., O. Hommel Co.* v. *Ferro Corp.*, 5 TRADE REG. REP. (CCH) (1981-2 Trade Cas.) 64, 264 (3d Cir. Sep. 14, 1981); *Northeastern Tel. Co.* v. *A.T.&T.*, 651 F.2d 76 (2d Cir. 1981); *California Computer Prods. Inc.* v. *I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *Janich Bros. Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

Finally, intracorporate conspiracy claims for bad faith litigation and restrictive employment practices also serve no purpose under the antitrust laws. There is no basis as a matter of antitrust policy for holding that a parent that agrees with or directs its susubsidiary to sue a competitor in bad faith should be liable for conspiracy. In the one reported case involving restrictive employment practices, the court rightly found no antitrust violation because the practices at issue were indistinguishable in purpose and effect from the internal management directives a corporation makes to its divisions, which raise no antitrust concerns. *Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128 (N.D. Cal. 1981).

argued in response that section 1 itself exalts form over substance by outlawing only contracts, combinations and conspiracies in restraint of trade and not restraints of trade as such, in fact the distinction in section 1 between single and dual firm behavior is not merely one of form. It is predicated on the concern regarding concerted action between distinct economic units.[235] "The policy consideration for treating an action effected by agreement between two competitors differently from the identical action by a single firm is the desire to maintain and encourage as many independent centers of initiative and decision making as possible."[236] Where the action taken is by two corporations which constitute a single decisionmaking entity by virtue of common ownership or control, application of section 1 will not advance this policy goal but instead will in all likelihood encourage the two corporations simply to formalize their unity to avoid the reach of the Act.

It has also been suggested that section 1 tolerates behavior by a single firm which has the equivalent in market power of a combination of independent companies on the ground that "benefits from technological efficiency of scale more than offset benefits which might arise from dividing that firm into smaller units."[237] Thus, it is contrary to the underlying policy assumptions of section 1 to treat two firms of comparable size differently solely on the basis that one firm has organized itself through use of subsidiaries and the other through divisions.

The question naturally arises, however, as to how thoroughgoing is our criticism of the literal approach. Should the law be that separately incorporated but related corporations are never capable of conspiring? While the

[235] *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[236] McQuade, *supra* note 3, at 185.

[237] *Id.*

literal approach goes too far in ignoring what is in fact single firm behavior, is there not a point at which common ownership becomes so attenuated that the policy goals of section 1 would be better secured by applying the statute?

We believe that the answer is "yes." Thus, as we indicated at the outset of this Article, our use of the terms subsidiary and affiliate refer to corporations wholly owned or controlled by a common parent. Where a corporation wholly owns another or has sufficient voting control over it so that it can change the corporate form of the subsidiary, there can be little doubt that only one economic entity exists, and that any agreement that it reaches is with itself. The fact of ownership or control means that the form of organization could be changed if those in control should decide to do so. It makes little sense to attempt to use section 1 to require independent behavior where the law of corporations gives the parent the option to eliminate any semblance of independence by operating as a corporation with divisions. Moreover, to the extent that the ownership of the one corporation by the other is the result of an acquisition, as opposed to internal growth, the acquisition may be challenged under sections 1 and 2 of the Sherman Act or section 7 of the Clayton Act.[238] If the acquisition is lawful, because the resulting economic concentration does not unreasonably restrain trade, evidence an attempt to monopolize, constitute an unlawful use of monopoly power, substantially lessen competition, or tend to create a monopoly, then the manner in which the parent chooses to exercise control over its subsidiary should have no antitrust consequences.

However, when two corporations share common ownership which is not sufficient to provide one with control of the other, any contract, combination, or conspiracy between the two takes on a different color. In these circumstances, each obviously has a mind of its own and is not conspiring with

[238] 15 U.S.C. § 18 (Supp. IV 1980).

itself. For example, where Company A holds shares in Company B for purposes of investment only, the fact of Company A's investment does not subject Company B to Company A's will as a matter of corporate law. Accordingly, holding that the two corporations are capable of conspiring does not do violence to the goal of section 1 which is to encourage and maintain as many independent decision-makers as possible.[229]

Of all the tests designed to form a coherent theory of intracorporate conspiracy, the "all the facts and circumstances" test of the Seventh, Eighth, and Ninth Circuits comes closest to defining when two firms are in fact one enterprise on a basis consistent with the goals of section 1. However, as discussed above, its emphasis on the indicia of interrelationships between the parent and subsidiary provides no clear guidelines as to what is sufficient to establish that separate corporations should be treated as a single entity. It thus creates fertile grounds for expensive and time-consuming litigation, at a time when antitrust law is already

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[229] The author of *Intra-Enterprise Conspiracy, supra* note 3, at 735-44, advocates a somewhat similar standard. There, the proposed limitation of the intracorporate conspiracy doctrine would only apply where the parent controls the "day-to-day operations" of its subsidiaries.

Willis and Pitofsky criticize the intra-enterprise conspiracy doctrine and would do away with it except where corporations hold themselves out as competitors or use their subsidiaries with a specific intent to acheive an anticompetitive result. Willis & Pitofsky, *supra* note 3, at 35. They confine their criticism of the doctrine to subsidiaries which are wholly owned or substantially owned, that is, those with no more than a five percent minority interest outstanding which is held by noncompetitors for investment only. *Id.* at 22.

under attack for its extraordinary expense and protracted nature.[240]

On balance, the goal of section 1, encouraging independent decisionmakers to act independently, would be better served by going the next step, and focusing on actual corporate control rather than on discrete facts which tend to indicate control over day-to-day operations. If a parent exercises its control over its subsidiary through numerous daily contacts and integrates the functions of the subsidiary into the parent, thereby leaving the subsidiary with little freedom of action, under the "all the facts and circumstances" test, it has a chance of being held incapable of conspiracy. If, however, the parent chooses not to exercise its control on a daily basis and does little more than provide general guidance as to policies, it may be held capable of conspiracy under the same test. The anomalous result is that the more a parent actually exercises its control, the less likely it is to be held liable for conspiracy under section 1. Conversely, the more a parent permits independence of action, the more likely its occasional assertion of control will result in exposure to section 1 liability. Far from encouraging parent and subsidiary to act as independent decisionmakers, such a test inevitably will encourage parents to exercise their control to the fullest extent.

Where a corporation has sufficient voting control to effectuate a change in the corporate form of its subsidiary, the subsidiary's "independence" is illusory. To treat the subsidiary as independent for purposes of section 1 may simply insure in the long run that it is not independent.

Almost thirty years ago, when the intracorporate conspiracy doctrine first appeared on the antitrust horizon, it was

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[240] *See* NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979).

termed a "weird concept."[241] Time has not invalidated the accuracy of that judgment. The intracorporate conspiracy doctrine advances no discernible antitrust goals. It has served only to create confusion and to add to the burdens of the already overcrowded federal courts. It is time for Congress or the courts to abandon the doctrine and to encourage application of section 1's strictures against truly independent, and not commonly owned or controlled, corporations.

[241] *Contract, Combination and Conspiracy, supra* note 3, at 46.